No. 14,972

United States Court of Appeals

For the Ninth Circuit

JAMES F. CRAFTS, *Appellant,* vs. FEDERAL TRADE COMMISSION, *Appellee.*	}

APPELLANT'S REPLY BRIEF.

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No. 14,972

IN THE

United States Court of Appeals

For the Ninth Circuit

James F. Crafts,

Appellant,

vs.

Federal Trade Commission,

Appellee.

APPELLANT'S REPLY BRIEF.

The primary issue in this case involves Public Law 15, 79th Congress (sometimes called the "McCarran Act"), which says that the Federal Trade Commission Act is applicable to the business of insurance "to the extent that such business is not regulated by State law." Query: Does the Federal Trade Commission have jurisdiction over advertising of accident and health insurance in any state where such advertising is "regulated by State law"?

The secondary issue (but actually the first problem) involves Section 6(c) of the Administrative Procedure Act which says that an administrative subpena shall be sustained "to the extent that it is found to be in accordance with law." Query: Should a District Court sustain a subpena merely because it was issued with proper formality

without also considering the defense that the Federal Trade Commission was exceeding its authority by requiring Mr. Crafts as President of Fireman's Fund Indemnity Company, to produce evidence of advertising over which the Commission has no jurisdiction?

Fireman's Fund Indemnity Company is a California corporation licensed to and doing business in all 48 States and the District of Columbia. The complaint in the administrative proceeding (as modified on a motion for more definite statement) seeks to regulate advertising of accident and health insurance by Fireman's Fund in all States, except California, and in the District of Columbia. The subpena served on Mr. Crafts is as broad as the original complaint but on motion to quash was limited to exclude California. It requires the production of advertising, insurance policies, and business records covering all of the other 47 States and the District of Columbia.

Fireman's Fund has contended from the beginning that its advertising of accident and health insurance is fully regulated by State law, i.e., by California law everywhere and by local law in other States and in the District of Columbia. The District Court refused to consider this question and sustained the subpena merely because it was issued with proper formality. This is contrary to all decisions of the United States Supreme Court (both before and after the passage of the Administrative Procedure Act) and particularly contrary to *Jones v. Securities and Exchange Commission*, 298 U.S. 1 (1935) and *U.S. v. Minker*, ... U.S. ...., 100 L. Ed. (Adv.) 191 (1956), both of which quashed administrative subpenas because the agency was acting beyond its authority.

The Federal Trade Commission in its Brief for Appellee ignores both of these decisions. Instead, the Commission argues that a question of "coverage" cannot be considered as a defense to an application to enforce a subpena. This may be true when "coverage" depends upon the very facts sought by the subpena, as, for example, in *Endicott-Johnson Corp. v. Perkins,* 317 U.S. 501 (1943), where the question was whether certain employees worked on government contracts or on private contracts. But it is not true when (as here) the question of jurisdiction is purely a matter of law depending on State statutes and not on any issues of fact.

The cases which the Commission cites do not support the argument that a District Court cannot consider the jurisdiction of the Commission before enforcing a subpena. For example, *United States v. Woerth,* 130 F. Supp. 930 (Brief for Appellee, pp. 5, 8, 10, and 12) says at page 942 that the first test is whether "the inquiry made is within the jurisdiction of the demanding agency."

The Commission attempts to avoid this basic legal principle by calling attention to its powers of investigation. The Commission says Public Law 15 gives it some power of some kind over some phase of the business of insurance. The Commission then argues that general power to investigate entitles the Commission to evidence of all acts or practices everywhere. The same argument was used in an attempt to sustain the subpena in *Jones v. Securities and Exchange Commission,* supra. The SEC contended that the order enforcing the subpena "may rest upon the general power to conduct investigations." 298 U.S. 25. The Supreme Court rejected the argument and

quashed the subpena, pointing out that the Commission had no jurisdiction over the particular proceeding in which the subpena had been issued. The same contention was necessarily rejected in *U.S. v. Minker,* supra. The immigration officials have general power to conduct investigations, but the subpenas were quashed when they attempted to exceed their authority in a particular case.

The Commission itself has given us another answer to this argument. The subpena served on Mr. Crafts was not issued as a part of any investigatory proceeding but instead is a part of an adjudicative proceeding commenced by the issuance and service of a formal complaint under the Commission's Rules of Practice for Adjudicative Proceedings. Code of Federal Regulations, Title 16, Chapter 1, Sub-chapter A, Part 3; 20 Federal Register, 3303, et seq. This complaint (Tr. 8) makes specific charges against Fireman's Fund (which the company denies); it gives notice of the time and place of an adversary hearing (Tr. 17); it requires the company to answer the charges (Tr. 17); and it sets forth a form of regulatory order which the Commission would issue in the event of no contest or default by the company (Tr. 18-19). The subpena served on Mr. Crafts is a part of this proceeding and would require him to testify and produce company records at the adversary hearing (Tr. 20-23). The Commission, having thus framed the issues in an adjudicative or quasi-judicial proceeding, cannot now rely upon its general powers of investigation in order to sustain the subpena. The validity of this subpena does not depend upon the power of investigation but is to be tested by the authority of the Commission to regulate the specific

acts and practices set forth in the complaint, i. e., advertising of accident and health insurance by Fireman's Fund.

Even if we should accept the contention that the Federal Trade Commission may have some power of some kind to investigate some phase of the business of insurance this would not mean that a District Court should enforce a Commission subpena in an adjudicative proceeding without first deciding that the purpose of the inquiry is a legitimate one. Sec. 6(c) of the Administrative Procedure Act says that a subpena may be enforced "to the extent that it is found to be in accordance with law." This requires the court to make a judicial determination of jurisdiction before ordering compliance. Or, as stated in the legislative history (Senate Committee Report, November 19, 1945, and House Committee Report, May 3, 1946), Section 6(c) "constitutes a statutory limitation upon the issuance or enforcement of subpenas in excess of agency authority or jurisdiction."

The Commission concedes (as it must) that lack of jurisdiction is an appropriate defense to an application to enforce an administrative subpena. Brief for Appellee, p. 7. Appellant presented this defense to the District Court in its answer (Tr. p. 24) and requested the District Court to quash the subpena or, in the alternative, to limit the inquiry to those areas (if any) in which the advertising was not regulated by State law. However, the District Court enforced the subpena merely because it had been issued with proper formality. The refusal of the District Court to consider the defense of no jurisdiction is clearly erroneous and should be reversed.

The District Court relied on *Tobin v. Banks & Rambaugh,* 5th Cir. 201 F. 2d 223, cert. den. 345 U.S. 943 (1953). This case may be right in refusing to consider "coverage" which depends upon the very facts sought by the subpena, but it cannot be construed as precluding judicial inquiry into the question of jurisdiction as a matter of law. The Administrative Procedure Act did not remove constitutional limitations on agency action. Instead, as Mr. Justice Jackson said in *U.S. v. Morton Salt Co.,* 338 U.S. 632 (1950):

> "The Administrative Procedure Act was framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in the legislation creating their offices. It created safeguards even narrower than the constitutional ones, against arbitrary official encroachment on private rights."

The question of jurisdiction in the present case is an issue of law. It does not depend upon any facts. The question, as Senator McCarran said, depends upon the existence of State statutes. (94 Cong. Record 11, p. 2314.) If the State statutes regulate advertising of accident and health insurance, there is no room for regulation by the Federal Trade Commission. There is no basis for suggesting, as the Commission does, that the extent of regulation by State law cannot be determined at this time in this proceeding.

The Commission does not deny that such advertising is regulated by local State law in all States and in the District of Columbia. However, the Commission refused

to concede the obvious and said appellant "does not show that there is a State regulation of insurance in 48 States." Brief for Appellee, p. 18.

This requires us to include the various statutes in the Appendix to this brief. When Public Law 15 was passed the National Association of State Insurance Commissioners prepared a model code for State regulation. This code, sometimes called the "Model Act," has been adopted with minor variations in 38 States for the purpose, as set forth therein, of regulating "trade practices in the business of insurance in accordance with the intent of Congress" as expressed in Public Law 15. We have chosen the Colorado statute as the example in the Appendix, with citations to the Act as adopted in the other 37 States. There are equivalent State statutes elsewhere.

In Appellant's Opening Brief we discussed the statutes of California (p. 40), Missouri (p. 30), Rhode Island (p. 31), the District of Columbia (p. 31), Montana (p. 32), and Mississippi (p. 33), which has since become a Model Act State. This leaves only the statutes of Alabama, Idaho, Illinois, North Dakota, Oregon and Texas. These other State laws are set forth in the Appendix to this brief. Each of them regulates advertising, including advertising of accident and health insurance. For example, Section 26 of the Alabama statute makes it unlawful for any insurance company doing business in Alabama to issue any circular or statement misrepresenting the terms of any insurance policy.

These State statutes constitute full regulation of insurance advertising (including accident and health insurance) by local law in each State. Further, as pointed out in

Appellant's Opening Brief, pp. 38-45, Fireman's Fund as a California insurance company is regulated by Section 780 of the California insurance code which prohibits Fireman's Fund from causing or permitting any misrepresentation about the terms or benefits of any policy issued by the company. This is a general limitation which follows Fireman's Fund everywhere and applies to all means of communication.

The Commission does not argue that Section 780 of the California insurance code is unconstitutional. Instead, the Commission suggests that citizens of other States should not be "forced to come to a California forum." Brief for Appellee, p. 15. The fallacy of this suggestion is apparent from the fact that Fireman's Fund is licensed to and doing business in every State and in the District of Columbia. (Tr. 10 and 55-56.)

The 38 Model Acts and the other equivalent State statutes would have been unnecessary unless Congress intended to permit State regulation unhampered by Federal legislation relating to interstate commerce except as to boycotts, coercion or intimidation. Public Law 15 was itself unnecessary unless Congress intended to preclude Federal regulation to the extent of regulation by State law.

When we filed Appellant's Opening Brief there were no decisions to the contrary. However, on April 24, 1956, the Commission issued its own first decision on this question. The 3-to-2 decision in the *American Hospital and Life Insurance Company* case seems to go beyond prior concepts of "concurrent jurisdiction" discussed in Appellant's Opening Brief (pp. 24-26) and claims exclu-

sive Federal jurisdiction over all insurance advertising except local advertising by local companies. The majority opinion by Commissioner Kern, the dissenting opinion of Chairman Gwynne and Commissioner Mason, and the additional views of Commissioner Mason are printed in the Appendix to this brief.

We would willingly adopt the dissenting opinion as our brief on this question. It points out the Congressional purpose of Public Law 15 to continue complete State regulation of the business of insurance unhampered by Federal legislation except as to boycotts, coercion or intimidation. The conclusion by the minority of "no concurrent jurisdiction" is amply supported by the very language of Public Law 15, by its legislative history, and by every Federal court decision which has considered its purpose and effect.

The majority opinion, on the other hand, necessarily ignores many of these factors in order to reach the conclusion that Congress intended "concurrent jurisdiction." It ignores *Prudential Insurance Co. v. Benjamin,* 328 U.S. 408 (1946), where the Supreme Court said, at pp. 429-30:

> "Obviously, Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation. The other was by declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be

subject to' the laws of the several states in these respects."

The majority opinion cites *Maryland Casualty Co. v. Cushing,* 347 U.S. 409 (1954), but ignores the statement on page 413 that the exclusive purpose of Public Law 15 was to counteract any adverse effect that the decision in *U.S. v. South-Eastern Underwriters Association,* 322 U.S. 533 (1944), "might be found to have on State regulation of insurance."

As we pointed out in Appellant's Opening Brief, p. 28, the adverse effect of the decision in *South-Eastern Underwriters* case was to make the business of insurance subject to Federal regulation. This adverse effect would continue unhampered under the theory of "concurrent jurisdiction." Public Law 15 must mean exclusive State jurisdiction to the extent of regulation by State law.

The majority opinion ignores *Wilburn Boat Co. v. Fireman's Fund Insurance Co.,* 348 U.S. 310 (1955), where the Supreme Court said, at page 319:

> "* * * In the South-Eastern case, however, all the opinions had emphasized the historical fact that States had always been free to regulate insurance. The measure Congress passed shortly thereafter, known as the McCarran Act, was designed to assure that existing state powers to regulate insurance would continue. Accordingly, the Act contains a broad declaration of congressional policy that the continued regulation of insurance by the States is in the public interest, and that silence on the part of Congress should not be construed to impose any barrier to continued regulation of insurance by the States."

It also ignores *North Little Rock Transportation Co. v. Casualty Reciprocal Exchange,* 8th Cir. 181 F. 2d 174 (1950), where the court said, at p. 176:

> "The purpose of the McCarran Act was to permit the States to continue the regulation of the business of insurance, unhampered, to the extent provided by the Act, by Federal legislation relating to interstate commerce. See *Prudential Insurance Co. v. Benjamin,* supra, p. 429 of 328 U.S."

The majority opinion cites *U.S. v. Sylvanus,* 7th Cir. 192 F. 2d 96 (1951). There is nothing in this case to support the theory of "concurrent jurisdiction." It is not a Federal Trade Commission case but a mail fraud case which could have arisen before or after the decision in the *South-Eastern Underwriters* case and before or after Public Law 15. Further, as Chairman Gwynne and Commissioner Mason point out in their dissenting opinion, the court in the *Sylvanus* case said, at p. 100:

> "It is clear, we think that by this legislation, the Congress established a public policy upon the part of the national government to refrain from interference with the regulation and taxation of insurance companies by the several states."

The purpose of Public Law 15 to permit the States to continue the regulation of the business of insurance unhampered by Federal legislation does not mean "concurrent jurisdiction." This is borne out not only by the cases cited above, but by the whole history of the Act and by its very language.

Section 3 of Public Law 15 provided a three-year moratorium during which time there was to be no fed-

eral regulation except as to boycotts, coercion or intimidation. The purpose of the moratorium, as Senator McCarran pointed out, was to give the various States time to enact their own statutes regulating the business of insurance. Conference Report on S. Bill 340, Vol. 91, Part 2, Cong. Rec. p. 1443. This three-year moratorium is totally inconsistent with the idea that Congress meant to establish a system of concurrent jurisdiction. If Congress did not want the Federal Trade Commission to regulate the business of insurance before the various States had an opportunity to pass their own statutes, how can it be said that Congress wanted the Commission to regulate after the States had set up their own schemes of regulation?

The other provisions of Public Law 15 are consistent with this view. Section 1 provides that the continued regulation by the several States of the business of insurance is in the public interest. Section 2(a) provides that the business of insurance and every person engaged therein shall be subject to the laws of the several States which relate to the regulation of such business. Section 2(b) provides that the Federal Trade Commission Act shall be applicable "to the extent that such business is not regulated by State law."

We see nothing in Public Law 15 and certainly nothing in any judicial decision which has considered it suggesting an intent by Congress to establish a system of dual or concurrent regulation. All indications negative such a thought. However, the majority opinion in the *American Hospital* case goes even further by denying that Public Law 15 in any way limits Federal jurisdiction.

The majority opinion asserts that Public Law 15 merely provides "that State authority over *intra*state insurance business that might affect interstate insurance business could not be disturbed by Federal regulation which did not specifically mention insurance". Appendix, p. 30.

We cannot agree with this interpretation of Public Law 15. Congress knew that modern insurance is not intrastate. Each opinion in the *South-Eastern Underwriters* case pointed out the nationwide character of the business. In fact, the interstate features of insurance were the basis for the decision, which in turn was the basis for Public Law 15.

When the Supreme Court said insurance was interstate commerce (after saying no for nearly 80 years), Congress had several alternatives:

(1) It might take no action and thereby allow Federal statutes to be imposed on the existing State systems of regulation and taxation; or

(2) It might adopt a comprehensive plan of Federal regulation, including policy forms, premium rates, and the many other things that mean complete regulation; or

(3) It might recognize, continue and foster the extensive systems of State regulation which had developed during the years when insurance could not be regulated by the Federal government.

Congress did not do nothing, and did not adopt a plan of Federal regulation. Instead, Congress enacted Public Law 15 which provides that certain statutes administered by the Federal Trade Commission shall be applicable to the business of insurance "to the extent that such

business is not regulated by State law," reserving, however, to the Federal Government the power over boycotts, coercion and intimidation.

If this means that California can regulate advertising by a California company in California but cannot regulate identical advertising in California by a Michigan company, or a Connecticut company, or a New York company, we might as well tear up Public Law 15.

Such an interpretation by the majority opinion in the *American Hospital* case ignores realities. It ignores the fact that the insurance business today necessarily crosses State lines. It suggests that California may regulate advertising by Fireman's Fund or any other California company, but that only the Federal Trade Commission can regulate advertising in California by an out-of-state company. Does this mean that advertising by an out-of-state company is immune to California regulation even though the company is licensed to do business in California and, therefore, subject to California law? We do not believe that Congress intended to make such a revolutionary change in the nationwide system of State regulation over the business of insurance.

There is only one logical answer. Public Law 15 must mean that Congress intended to permit State regulation of insurance, unhampered and unrestricted by Federal legislation under the commerce clause of the Constitution.

If there could have been any doubt that Congress intended State regulation and State taxation to be free of all commerce clause restriction, such doubt was settled by *Prudential Insurance Co. v. Benjamin,* supra,

which upheld Public Law 15 as the basis for a State tax which discriminated against interstate commerce.

The fact that this regulation by a State of advertising within its own borders may affect the business of insurance in other States does not violate the due process clause. The commerce clause discussed above is a grant of power to the Federal government which Congress may use, delegate or ignore. The due process clause, on the other hand, is a restriction on the several States. The Commission cites a portion of the legislative history of Public Law 15 (H.R. No. 143, 79th Congress, 1st Sess.) suggesting that the due process clause prohibits State regulation which might have repercussions in other States. This portion of the legislative history refers to old formulae represented by such cases as *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). However, as pointed out in Appellant's Opening Brief, pp. 43-45, it is now well settled that a State may apply its own law to acts which occur outside of its borders where interests of the State are in some manner affected by these actions. In any event, none of the due process cases (old or new) are relevant to State regulation of advertising within its own borders, for there the acts regulated take place within the regulating State.

Advertising by Fireman's Fund is regulated not only by California law but also by local law in each of the States and in the District of Columbia. This regulation everywhere by State law precludes regulation by the Federal Trade Commission. Therefore, the Commission is acting beyond its jurisdiction and without authority in the present proceeding. The subpena requiring Mr.

Crafts to produce evidence of advertising everywhere (except in California) should be quashed as were the subpenas in *Jones v. Securities and Exchange Commission,* supra, and *U.S. v. Minker,* supra. However, if the Commission has some jurisdiction over some type of advertising somewhere, the subpena should be limited to this jurisdiction and Mr. Crafts should not be required to produce all evidence of all advertising everywhere.

Dated: May 24, 1956.

Respectfully submitted,
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and
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Attorneys for Appellant.

(Appendix Follows.)

Appendix.

Appendix

STATE FAIR TRADE PRACTICES ACT.

COLORADO

Unfair Methods of Competition

72-15-1. *Purpose of article.* The purpose of this article is to regulate trade practices in the business of insurance in accordance with the intent of congress as expressed in the act of congress of March 9, 1945 (Public Law 15, 79th Congress), by defining, or providing for the determination of, all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

72-15-2. *Definitions.* When used in this article:

(1) "Person" shall mean any individual, corporation, association, partnership, reciprocal exchange, interinsurer, Lloyds insurer, fraternal benefit society, and any other legal entity engaged in the business of insurance, including agents, brokers and adjusters.

(2) "Commissioner" shall mean the commissioner of insurance of the state.

72-15-3. *Unfair methods prohibited.* No person shall engage in this state in any trade practice which is defined in this article, as, or determined pursuant to this article to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

72-15-4. *Unfair methods defined.* The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:

(1) Making, issuing, circulating, or causing to be made, issued or circulated, any estimate, illustration, circular or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby or the dividends or share of the surplus to be received thereon, or making any false or misleading statement as to the dividends or share of surplus previously paid on similar policies, or making any misleading representation or any misrepresentations as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates, or using any name or title of any policy or class of policies misrepresenting the true nature thereof, or making any misrepresentation to any policyholder insured in any company for the purpose of inducing or tending to induce such policyholder to lapse, forfeit, or surrender his insurance.

(2) Making, publishing, disseminating, circulating, or placing before the public or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio station, or in any other way, an advertisement, announcement or statement containing any assertion, representation or statement with respect to the business of insurance or with respect to any person in the conduct of his insurance business, which is untrue, deceptive or misleading.

(3) Making, publishing, disseminating, or circulating, directly or indirectly, or aiding, abetting or encouraging the making, publishing, disseminating or circulating of any oral or written statement or any pamphlet, circular, article

or literature which is false, or maliciously critical or derogatory to the financial condition of an insurer, and which is calculated to injure any person engaged in the business of insurance.

(4) Entering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance.

(5) Filing with any supervisory or other public official, or making, publishing, disseminating, circulating or delivering to any person, or placing before the public, or causing directly or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public, any false statement of financial condition of an insurer with intent to deceive.

Making any false entry in any book, report or statement of any insurer with intent to deceive any agent or examiner lawfully appointed to examine into its condition or into any of its affairs, or any public official to whom such insurer is required by law to report, or who has authority by law to examine into its condition or into any of its affairs, or, with like intent, willfully omitting to make a true entry of any material fact pertaining to the business of such insurer in any book, report or statement of such insurer.

(6) Issuing or delivering or permitting agents, officers, or employees to issue or deliver, agency company stock or other capital stock, or benefit certificates or shares in any common law corporation, or securities or any special or advisory board contracts or other contracts of any kind promising returns and profits as an inducement to insurance.

(7) (a) Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract.

(b) Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees, or rates charged for any policy or contract of accident or health insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever.

(8) (a) Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any contract of life insurance, life annuity or accident and health insurance, or agreement as to such contract other than as plainly expressed in the contract issued thereon, or paying or allowing, or giving or offering to pay, allow, or give, directly or indirectly, as inducement to such insurance, or annuity, any rebate of premiums payable on the contract, or any special favor or advantage in the dividends or other benefits thereon, or any valuable considerations or inducement whatever not specified in the contract; or giving, or selling, or purchasing or offering to give, sell, or purchase as inducement to such insurance or annuity or in connection therewith, any stocks, bonds or other securities of any insurance company or other corporation, association, or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the contract.

(b) Nothing in subsection (7) or paragraph (a) of subsection (8) of this section shall be construed as including

within the definition of discrimination or rebates any of the following practices: in the case of any contract of life insurance or life annuity, paying bonuses to policyholders or otherwise abating their premiums in whole or in part out of the surplus accumulated from nonparticipating insurance, provided that any such bonuses or abatement of premiums shall be fair and equitable to policyholders and for the best interests of the company and its policyholders; in the case of life insurance policies issued on the industrial debit plan, making allowance to policyholders who have continuously for a specified period made premium payments directly to an office of the insurer in an amount which fairly represents the saving in collection expense; readjustment of the rate of premium for a group insurance policy based on the loss or expense experience thereunder, at the end of the first or any subsequent policy year of insurance thereunder, which may be made retroactive only for such policy year.

72-15-5. *Power of commissioner.* The commissioner shall have power to examine and investigate into the affairs of every person engaged in the business of insurance in this state in order to determine whether such person has been or is engaged in any unfair method of competition or in any unfair or deceptive act or practice prohibited by section 72-15-3.

72-15-6. *Hearings—witnesses—service.* (1) Whenever the commissioner shall have reason to believe that any such person has been engaged or is engaging in this state in any unfair method of competition or any unfair or deceptive act or practice defined in section 72-15-4, and that a proceeding by him in respect thereto would be to the interest of the public, he shall issue and serve upon such person a state-

ment of the charges in that respect and a notice of a hearing thereon to be held at a time and place fixed in the notice which shall not be less than twenty days after the date of the service thereof.

(2) At the time and place fixed for such hearing, such person shall have an opportunity to be heard and to show cause why an order should not be made by the commissioner requiring such person to cease and desist from the acts, methods or practices so complained of. Upon good cause shown, the commissioner shall permit any person to intervene, appear and be heard at such hearing by counsel or in person.

(3) Nothing contained in this article shall require the observance at any such hearing of formal rules of pleading or evidence.

(4) The commissioner, upon such hearing, may administer oaths, examine and cross-examine witnesses, receive oral and documentary evidence, and shall have the power to subpoena witnesses, compel their attendance, and require the production of books, papers, records, correspondence, or other documents which he deems relevant to the inquiry. The commissioner, upon such hearing, may, and upon the request of any party, shall cause to be made a stenographic record of all the evidence and all the proceedings had at such hearings. If no stenographic record is made and if a judicial review is sought, the commissioner shall prepare a statement of the evidence and proceedings for use on review. In case of a refusal of any person to comply with any subpoena issued hereunder or to testify with respect to any matter concerning which he may be lawfully interrogated, the district court of the city and county of Denver or the

county where such party resides, on application of the commissioner, may issue an order requiring such person to comply with such subpoena and to testify; and any failure to obey any such order of the court may be punished by the court as a contempt thereof.

(5) Statements of charges, notices, orders, and other processes of the commissioner under this article may be served by anyone duly authorized by the commissioner, either in the manner provided by law for service of process in civil actions, or by registering and mailing a copy thereof to the person affected by such statement, notice, order or other process at his or its residence or principal office or place of business. The verified return by the person so serving such statement, notice, order, or other process, setting forth the manner of such service, shall be proof of the same, and the return postcard receipt for such statement, notice, order or other process, registered and mailed as aforesaid, shall be proof of the service of the same.

72-15-7. *Cease and desist orders.* (1) If, after such hearing, the commissioner shall determine that the method of competition or the act or practice in question is defined in section 72-15-4 and that the person complained of has engaged in such method or competition, act or practice in violation of this article, he shall reduce his findings to writing and shall issue and cause to be served upon the person charged with the violation an order requiring such person to cease and desist from engaging in such method of competition, act, or practice.

(2) Until the expiration of the time allowed under subsection (1) of section 72-15-8 of this article for filing a petition for review, by appeal or writ of certiorari, if no no

(sic) such petition has been duly filed within such time or, if a petition for review has been filed within such time, then until the transcript of the record in the proceeding has been filed in the district court, the commissioner at any time, upon such notice, and in such manner as he shall deem proper, may modify or set aside in whole or in part any order issued by him under this section.

(3) After the expiration of the time allowed for filing such a petition for review if no such petition has been duly filed within such time, the commissioner at any time, after notice and opportunity for hearing, may reopen and alter, modify or set aside, in whole or in part, any order issued by him under this section whenever in his opinion conditions of fact or of law have so changed as to require such action or if the public interest shall so require.

72-15-8. *Judicial review of orders.* (1) Any person required by an order of the commissioner under section 72-15-7 to cease and desist from engaging in any unfair method of competition or any unfair or deceptive act or practice defined in section 72-15-4 may obtain a review of such order by filing in the district court of the city and county of Denver within fifteen days from the date of the service of such order, a written petition praying that the order of the commissioner be set aside. A copy of such petition shall be forthwith served upon the commissioner, and thereupon the commissioner forthwith shall certify and file in such court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the commissioner. Upon such filing of the petition and transcript such court shall have jurisdiction of the proceeding and of the question determined therein, shall determine whether the filing of such petition shall operate as a stay

of such order of the commissioner and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree modifying, affirming or reversing the order of the commissioner, in whole or in part. The findings of the commissioner as to the facts, if supported by the evidence, shall be conclusive.

(2) To the extent that the order of the commissioner is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the commissioner. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commissioner, the court may order such additional evidence to be taken before the commissioner and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commissioner may modify his findings of fact, or make new findings by reason of the additional evidence so taken, and he shall file such modified or new findings which, if supported by additional evidence shall be conclusive, and his recommendation, if any, for the modification or setting aside of his original order, with the return of such additional evidence.

(3) A cease and desist order issued by the commissioner under section 72-15-7 shall become final:

(a) Upon the expiration of the time allowed for filing a petition for review if no such petition has been duly filed within such time; except that the commissioner may thereafter modify or set aside his order to the extent provided in subsection (2) of section 72-15-7; or

(b) Upon the final decision of the court if the court directs that the order of the commissioner be affirmed or the petition for review dismissed.

(4) No order of the commissioner under this article or order of a court to enforce the same shall in any way relieve or absolve any person affected by such order from any liability under any other laws of this state.

72-15-9. *Procedure as to unfair methods not defined.* (1) Whenever the commissioner shall have reason to believe that any person engaged in the business of insurance is engaging in this state in any method of competition or in any act or practice in the conduct of such business which is not defined in section 72-15-4, that such method of competition is unfair or that such act or practice is unfair or deceptive and that a proceeding by him in respect thereto would be to the interest of the public, he may issue and serve upon such person a statement of the charges in that respect and a notice of a hearing thereon to be held at a time and place fixed in the notice, which shall not be less than twenty days after the date of the service thereof. Each such hearing shall be conducted in the same manner as the hearings provided for in section 72-15-6. The commissioner, after such hearing, shall make a report in writing in which he shall state his findings as to the facts, and he shall serve a copy thereof upon such persons.

(2) If such report charges a violation of this article and if such method of competition, act or practice has not been discontinued, the commissioner may, through the attorney general of this state, at any time after fifteen days after the service of such report cause a petition to be filed in the district court of this state within the district wherein the person resides or has his principal place of business, to en-

join and restrain such person from engaging in such method, act or practice. The court shall have jurisdiction of the proceeding and shall have power to make and enter appropriate orders in connection therewith and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public pendente lite.

(3) A transcript of the proceedings before the commissioner including all evidence taken and the report and findings shall be filed with such petition. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commissioner the court may order such additional evidence to be taken before the commissioner and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commissioner may modify his findings of fact or make new findings by reason of the additional evidence so taken, and he shall file such modified or new findings with the return of such additional evidence.

(4) If the court finds that the method of competition complained of is unfair or that the act or practice complained of is unfair or deceptive, that the proceeding by the commissioner with respect thereto is to the interest of the public and that the findings of the commissioner are supported by the weight of the evidence, it shall issue its order enjoining and restraining the continuance of such method of competition, act or practice.

72-15-10. *Judicial review by intervenor.* If the report of the commissioner does not charge a violation of this article, then any intervenor in the proceedings, within fifteen

days after the service of such report, may cause a notice of appeal to be filed in the district court of the city and County of Denver for a review of such report. Upon such review, the court shall have authority to issue appropriate orders and decrees in connection therewith, including, if the court finds that it is to the interest of the public, orders enjoining and restraining the continuance of any method of competition, act or practice which it finds, notwithstanding such report of the commissioner, constitutes a violation of this article.

72-15-11. *Penalty for violation of cease and desist order.* If after a period of ten days after a cease and desist order has been issued, the person against whom said order has been issued continues to violate the same, the commissioner upon satisfactory proof of said continued violation may suspend said person's license pending final settlement of said action. If upon final determination, provided the order of the commissioner is sustained, either by the appellate court or by default, the cease and desist order continues to be violated, such person's licenses may be revoked by order of the commissioner or the court to which the order has been appealed. Nothing in this section shall be construed as limiting a court in enforcing its own orders.

72-15-12. *Provisions additional to existing law.* The powers vested in the commissioner by this article shall be additional to any other powers to enforce any penalties, fines or forfeitures authorized by law with respect to the methods, acts and practices hereby declared to be unfair or deceptive.

72-15-13. *Immunity from prosecution.* If any person shall ask to be excused from attending and testifying or from producing any books, papers, records, correspondence

or other documents at any hearing on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture, and notwithstanding shall be directed to give such testimony or produce such evidence, he must none the less comply with such direction; but he shall not thereafter be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence pursuant thereto; and no testimony so given or evidence produced shall be received against him upon any criminal action, investigation or proceeding. No such individual so testifying shall be exempt from prosecution or punishment for any perjury committed by him while so testifying and the testimony or evidence so given or produced shall be admissible against him upon any criminal action, investigation or proceeding concerning such perjury, nor shall he be exempt from the refusal, revocation or suspension of any license, permission or authority conferred, or to be conferred, pursuant to the insurance law of this state. Any such individual may execute, acknowledge and file in the office of the commissioner a statement expressly waiving such immunity or privilege in respect to any transaction, matter or thing specified in such statement and thereupon the testimony of such person or such evidence in relation to such transaction, matter or thing may be received or produced before any judge or justice, court, tribunal, grand jury or otherwise, and if so received or produced such individual shall not be entitled to any immunity or privilege on account of any testimony he may so give or evidence so produced.

CITATIONS TO STATE FAIR TRADE PRACTICES ACT (MODEL ACT).

1. Arizona: Arizona Code, Insurance, Secs. 61-3301 to 61-3318 (Laws 1954, Ch. 64, Art. 21).
2. Arkansas: Arkansas Stats. Anno., Insurance, Secs. 66-1701 to 66-1713 (Acts 1949, No. 303).
3. Colorado: Colorado Revised Stats., Insurance, Secs. 72-15-1 to 72-15-13 (L. 49, pp. 475-483; CSA, C. 87).
4. Connecticut: Gen. Stats., 1955 Supp., Insurance, Secs. 2816d to 2821d.
5. Delaware: Senate Bill 347, effective date June 13, 1955.
6. Florida: Florida Stats., Anno. Insurance, Secs. 643.01 to 643.13 (Laws 1947, C. 24202).
7. Georgia: Georgia Code, Insurance, Secs. 56-401a to 56-413a (Laws 1950, No. 748).
8. Indiana: Burns Indiana Stats., Insurance, Secs. 39-5301 to 39-5318 (Acts 1947, Ch. 112).
9. Iowa: Iowa Acts 1955, Ch. 237.
10. Kansas: Kansas General Stats., Insurance, Secs. 40-2401 to 40-2414 (L. 1955, Ch. 247).
11. Kentucky: Kentucky Rev. Stats., Insurance, Secs. 304.924 to 304.945 (L. 1950, C. 21).
12. Louisiana: Louisiana Rev. Stats., Insurance, Secs. 22:1211 to 22:1217 (Acts 1948, No. 195).
13. Maine: Rev. Stats of Maine, Insurance, C. 60, Secs. 146-158 (L. 1949, C. 319).
14. Maryland: Anno. Code of Maryland, Insurance, Art. 48A, Secs. 321-335 (L. 1947, Ch. 757).

15. Massachusetts: Anno. Laws of Massachusetts, C. 176D, Secs. 1 to 14 (L. 1947, Ch. 659).

16. Michigan: Michigan Stats. Anno., Insurance, Secs. 24.567 (71) to 24.567 (85) (Pub. Acts. 1949, No. 228).

17. Minnesota: Minnesota Stats. Anno., Insurance, Secs. 72.20 to 72.33 (Laws 1947, C. 129).

18. Mississippi: House Bill 145, effective date February 29, 1956.

19. Nebraska: Rev. Stats. of Nebraska, Insurance, Secs. 44-1501 to 44-1521 (Laws 1947, C. 170).

20. Nevada: Nevada Compiled Laws, Insurance, Secs. 3656.48a to 3656.48i (Stats. 1949, 430).

21. New Hampshire: New Hampshire Rev. Stats. Anno., Secs. 417:1 to 417:17 (L. 1947, 189).

22. New Jersey: New Jersey Stats. Anno., Corporations and Institutions for Finance and Insurance, Secs. 17:29B-1 to 17:29B-14 (L. 1947, C. 379).

23. New Mexico: New Mexico Stats., 1953, Insurance, 58-9-9 to 58-9-18 (Laws 1947, Ch. 127).

24. New York: McKinney's Consol. Laws of New York, Insurance Law, Bk. 27, Secs. 270-282 (L. 1948, C. 501).

25. North Carolina: Gen. Stats. of North Carolina, Secs. 58-54.1 to 58-54.13 (L. 1949, Ch. 1112).

26. Ohio: Page's Ohio Rev. Code, Insurance, Secs. 3901.19-3901.23 (126 Ohio Laws Volume, Senate Bill 385 (1955)).

27. Oklahoma: Oklahoma Stats. Anno., Insurance, Tit. 36, Secs. 117.1-117.14 (Laws 1955, p. 218 et seq.).

28. Pennsylvania: Purdon's Pennsylvania Stats. Anno., Insurance, Tit. 40, Secs. 1151-1162 (1947, June 5, P.L. 445).

29. South Carolina: Code of Laws of South Carolina, Insurance, Secs. 37-1201 to 37-1223 (1947 (45) 322).

30. South Dakota: South Dakota Code, Insurance, Secs. 31-11A01 to 31-11A08 (Session Laws 1947, Ch. 144).

31. Tennessee: Williams' Tennessee Code Anno., Trade and Commerce, Secs. 6459.56 to 6459.69 (L. 1947, Ch. 202).

32. Utah: Utah Code Anno., Insurance, Secs. 31-27-1 to 31-27-22 (L. 1947, Ch. 63).

33. Vermont: Public Acts 1955, No. 174.

34. Virginia: Code of Virginia, Insurance, Secs. 38.1-49 to 38.1-57 (L. 1952, C. 317).

35. Washington: Rev. Code of Washington, Insurance, Secs. 48.30.010 to 48.30.250 (L. 1947, C. 79).

36. West Virginia: West Virginia Code of 1955, Insurance and Annuity Contracts, Secs. 3472(68) to 3472(82) (L. 1955, C. 96).

37. Wisconsin: Wisconsin Stats. Ch. 207, Secs. 207.01 to 207.14 (L. 1947, Ch. 520).

38. Wyoming: Wyoming Compiled Stats., Insurance, Secs. 52.1501 to 52.1512 (Approved March 1, 1955).

ALABAMA

Code of Alabama, Insurance, Tit. 28

§26. *Unlawful to issue statement misrepresenting terms of any policy, etc.* No insurance company doing business in this State and no officer, director or agent thereof shall issue

or circulate or cause or permit to be issued or circulated, any estimate, illustration, circular or statement of any sort misrepresenting the terms of any policy issued by it or the benefits or advantages promised thereby, or the dividends or shares of surplus to be received thereon, or shall use any name or title of any policy or class of policies misrepresenting the true nature thereof. Nor shall any such company, agent or broker make any misrepresentation to any person insured in such company or in any other company for the purpose of inducing or tending to induce any person to lapse, forfeit or surrender his insurance, policy or contract. (1909, p. 111; 1936-37, Ex. Sess., p. 266.)

§28. *Violation misdemeanor.* Violation of the two preceding sections by an agent or officer of any insurance company, shall be a misdemeanor and punished by a fine not less than one hundred nor more than five hundred dollars, or imprisonment in the county jail for thirty days, or by both such fine and imprisonment; and if a company violates or participates in such violation, such company shall have its certificate of authority to do business in this state suspended for a period not exceeding one year. (1909, p. 111.)

IDAHO

Idaho Code, Insurance

41-1204. *Misrepresentations prohibited.* No insurance company, association or society, or any officer, director, agent, broker or solicitor thereof, or any other person, shall issue, circulate or use, or cause or permit to be issued, circulated or used, any written or oral statement or circular misrepresenting the terms of any policy issued or to be issued by such company, or misrepresent the benefits or

privileges promised under any such policy, or the dividend or share of the surplus to be received thereon. (1913, ch. 97.)

41-1206. *Penalty for misrepresentation and twisting.* Any insurance company, association or society, agent, broker or solicitor, or any person, firm, association or corporation, violating the provisions of the two preceding sections, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than $100.00, or imprisonment in the county jail for not more than six months, or by both such fine and imprisonment, for each such violation.

The department of insurance shall have authority, in its discretion, to revoke the license theretofore issued to any company, association, society, agent or broker, convicted of a violation of the provisions of the two preceding sections. (1913, Ch. 97.)

ILLINOIS

JONES' ILLINOIS STATS. ANNO. (1939 REV. VOL.), INSURANCE

66.824 §149. *Misrepresentation and Defamation Prohibited.* (1) No company doing business in this State, and no officer, director, agent, clerk or employee thereof, broker, or any other person, shall make, issue or circulate or cause or knowingly permit to be made, issued or circulated any estimate, illustration, circular, or verbal or written statement of any sort misrepresenting the terms of any policy issued or to be issued by it or any other company or the benefits or advantages promised thereby or any misleading estimate of the dividends or share of the surplus to be received thereon, or shall by the use of any name or title of any policy or class of policies misrepresent the nature thereof.

(2) No such company or officer, director, agent, clerk or employee thereof, or broker shall make any misleading representation or comparison of companies or policies, to any person insured in any company for the purpose of inducing or tending to induce a policyholder in any company to lapse, forfeit, change or surrender his insurance, whether on a temporary or permanent plan.

(3) No such company, officer, director, agent, clerk or employee thereof, broker or other person shall make, issue or circulate or cause or knowingly permit to be made, issued or circulated any pamphlet, circular, article, literature or verbal or written statement of any kind which contains any false or malicious statement calculated to injure any company doing business in this State in its reputation or business.

(4) Any company, officer, director, agent, clerk or employee thereof, broker, or other person who violates any of the provisions of this section, or knowingly participates in or abets such violation, shall be required to pay a penalty of not less than one hundred dollars, nor more than one thousand dollars, to be recovered in the name of the People of the State of Illinois by the State's Attorney of the county in which the violation occurs and the penalty so recovered shall be paid into the county treasury.

(5) No company shall be held guilty of having violated any of the provisions of this section by reason of the act of any agent, solicitor or employee, not an officer, director or department head thereof, unless an officer, director or department head of such company shall have knowingly permitted such act or shall have had prior knowledge thereof. (Sec. 761, Ch. 73, Ill. Code.)

NORTH DAKOTA

North Dakota Rev. Code of 1943, Insurance

26-1011. *Misrepresentation of Terms of Policy and Future Dividends Prohibited.* No life, health, or accident insurance company doing business in this state, and no officer, director, agent, or solicitor of any life, health, or accident insurance company, shall issue, circulate, or use, or cause or permit to be issued, circulated, or used, any written or oral statement or circular misrepresenting the terms of any policy issued or to be issued by such company, or the benefits or advantages promised thereby, or make an estimate, with intent to deceive, of the future dividends or shares of surplus payable under such policy, or use any name or title of any policy or class of policies misrepresenting the true nature thereof.

26-1013. *Revocation or Suspension of Agent's License for Misrepresentation or Discrimination; Appeal.* Upon satisfactory evidence of the violation of any of the provisions of this chapter relating to misrepresentation or discrimination by any agent or solicitor of any life, health, or accident insurance company, the commissioner of insurance shall suspend or revoke the license of such offending solicitor or agent, and he may refuse to issue a new license to the offending agent or solicitor for a period of not to exceed one year thereafter. When a license shall be refused, suspended, or revoked, the party aggrieved may appeal to the district court of Burleigh county.

26-1014. *Penalty for Violating Provisions Relating to Misrepresentation and Discrimination.* Any officer, agent solicitor, or representative of any life, health, or accident company or association, or any other person, who shall vio

ate any of the provisions of sections 26-1009, 26-1010, 26-1011, 26-1012, or 26-1013 shall be guilty of a misdemeanor and shall be punished by a fine of not more than five hundred dollars, or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment, for each such violation. Any life, health, or accident insurance company found guilty of a violation of the provisions of sections 26-1009 or 26-1010 by the commissioner of insurance upon a hearing, after fifteen days' notice, shall be subject to a penalty, not exceeding five hundred dollars, to be imposed by the commissioner. Upon default of the payment of such penalty, the commissioner may revoke the license of the offending company. Upon a second conviction before the commissioner upon a similar hearing, the commissioner of insurance shall revoke the license to transact business in this state of the offending company.

OREGON

Oregon Rev. Stats.

736.608. *Prohibition against untrue or deceptive advertising.* (1) No insurance company or agent, or attorney as defined in ORS 749.010 shall make, publish, disseminate, circulate, or place before the public, or cause, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio station, or in any other way, an advertisement, announcement or statement containing any assertion, representation or statement with respect to the business of insurance or with respect to any person in the conduct of his insurance business, which is untrue, deceptive or misleading.

(2) Whenever the commissioner has knowledge of any violation of this section, he forthwith shall order such offending company, or agent, or attorney as defined in ORS 749.010 to discontinue immediately such practice or show cause to the satisfaction of the commissioner why such order should not be complied with.

(3) If such order is not complied with within 30 days of its receipt, the commissioner shall, as provided in ORS 737.550, revoke the license or certificate of authority of such offending company or agent, or attorney as defined in ORS 749.010. No renewal of a license or certificate of authority revoked pursuant to this subsection shall be granted within three years from the date of the revocation. (Laws, 1955, Ch. 500.)

TEXAS

Vernon's Penal Code of the State of Texas

Art. 580b. *Misrepresentation as to terms of insurance policy.*

Section 1. No Life, Health or Casualty Insurance Corporation including corporations operating on the cooperative or assessment plan, Mutual Insurance Companies, and Fraternal Benefit Associations or Societies, and any other societies or associations authorized to issue insurance policies in this State, and no officer, director, representative or agent therefor or thereof, or any other person, corporation or co-partnership, shall issue or circulate or cause or permit to be issued for circulation, any illustrated circular or statement of any sort, misrepresenting the terms of any policy issued by any such corporation or association or any certificate of membership issued by any such society or corpora-

ion, or other benefits or advantages permitted thereby, or any misleading statement of the dividends or share of surplus to be received thereon, or shall use any name or title of any policy or class of policies, or certificates of membership or class of such certificate, misrepresenting the true nature thereof. Nor shall any such corporation, society or association, or officer, director, agent or representative thereof, or any other person, make any misleading representations or incomplete comparisons of policies or certificates of membership to any person insured in such corporation, association or society, or member thereof, for the purpose of inducing or tending to induce, such person to lapse, forfeit or surrender his said insurance or membership therein.

Sec. 2. If any person shall violate any of the provisions of Section 1 hereof, he shall be guilty of a misdemeanor, and, upon conviction, shall be fined in a sum not less than Twenty-five ($25.00) Dollars nor more than Five Hundred ($500.00) Dollars, or be imprisoned in the county jail not more than sixty (60) days, or by both such fine and imprisonment.

Sec. 3. The Commissioner of Insurance,[1] upon giving five (5) days' notice by registered mail, and upon hearing had for that purpose, may forfeit the charter, permit or license to do business of any society, association or corporation violating the provisions hereof, and may forfeit likewise the certificate of any person to write such insurance, where a certificate is required by law. (Acts 1931, Ch. 332.)

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[1]Now Board of Insurance Commissioners—see V.A.T.S. Insurance, art. 1.02.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Commissioners:
John W. Gwynne, Chairman
Lowell B. Mason
Robert T. Secrest
Sigurd Anderson
William C. Kern

In the Matter of
THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY, a corporation. } Docket No

OPINION OF THE COMMISSION

By Kern, Commissioner:

Counsel in support of the complaint issued in this pro-ceeding has appealed from the hearing examiner's initia decision, in which, after holding that Public Law 15 of th 79th Congress (McCarran-Ferguson Insurance Regulatio Act)[1] limits the Federal Trade Commission's jurisdictio herein to respondent's activities in the State of Mississipp he dismissed the complaint for failure of proof.

Respondent, a Texas corporation, is licensed to conduc and does conduct, a health-and-accident insurance busines in Arizona, Arkansas, Colorado, Illinois, Indiana, Kansa Kentucky, Louisiana, Mississippi, Missouri, New Mexic Oklahoma, Tennessee, and Texas. It sells its health-and-acc dent insurance policies exclusively through licensed agen in each of those States, and its only advertising consists

[1] 59 Stat. 33 (1945); 15 U. S. C. 1011ff.

printed brochures, which it mails from its home office in San Antonio, Texas, to its agents in other States for display or distribution to prospective policyholders in the course of sales interviews. Applications secured by respondent's agents in States other than Texas are mailed to respondent's home office, where the policies are issued and mailed to the agents for delivery to the new policyholders. The complaint alleged that respondent's advertising contains various false, misleading and deceptive representations in violation of the Federal Trade Commission Act. Respondent maintains that all States in which it carries on its operations have laws that forbid it or its agents to make misrepresentations in the course of selling its insurance and that under the McCarran-Ferguson Act this is sufficient to remove it from the scope of the Federal Trade Commission Act.

Thus at the threshold of our consideration of this appeal we face an important jurisdictional question. The basis of the hearing examiner's holding that the Commission's jurisdiction extends to respondent's transactions in Mississippi alone is that each of the other States where it advertises or sells its insurance policies (saving from consideration respondent's home State of Texas, inasmuch as jurisdiction has not been asserted over respondent's business transacted wholly within that State) fully regulates the business of insurance by legislative enactment and that to the extent such regulation exists our jurisdiction has been withdrawn by the McCarran-Ferguson Act.

That statute[2] directly and expressly provides that after

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[2]The McCarran-Ferguson Act reads in full text as follows:

An Act to express the intent of the Congress with reference to the regulation of the business of insurance.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress

January 1, 1948, the Federal Trade Commission Act shall apply to the business of insurance "to the extent that such business is not regulated by State law." In the judgment of the examiner, the Commission's jurisdiction over the

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hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Sec. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Sec. 3. (a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

Sec. 4. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

Sec. 5. As used in this Act, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

Sec. 6. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected.

commercial activities of insurance companies is contingent upon an absence of State regulatory legislation. Implicit in that view is the proposition that the sum of jurisdiction—State and Federal—over commerce is no more than the aggregate of the several State jurisdictions. We need scarcely point out that such a concept not only neglects the exclusive Federal jurisdiction over commerce *among* the States, conferred by Section 3 of Article I of the Constitution of the United States, but is inconsistent with the fundamental constitutional doctrine of the separation of State and Federal powers.

We do not think that the McCarran-Ferguson Act, considered solely by its terms or along with its legislative history and judicial interpretation, admits of such a construction.

In *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 (1944), the Supreme Court in effect overturned *Paul* v. *Virginia,* 75 U. S. 168 (1868), and the line of related cases, all of which were bottomed on the principle that contracts of insurance are not commerce, either interstate or *intra*state, and declared that the conduct of fire insurance business across State lines is "Commerce among the several States" and accordingly a conspiracy to monopolize interstate trade and commerce in that business violates the Sherman Antitrust Act. At the same time the Court pointed out that, for constitutional purposes, certain activities of a business may be *intra*state and hence subject to State control, while other activities of the same business may be interstate and subject to Federal regulation. However, the Court did not attempt to decide which State laws were applicable to the business of insurance and to what

extent they were not applicable. A local insurance company which sold only within the State was clearly subject to the State laws, but the extent to which a company doing an interstate business was subject to State laws was not made clear.

The McCarran-Ferguson Act was enacted the year following *South-Eastern Underwriters.* Its title states that it is an act to express the intent of Congress with reference to the regulation of the business of insurance. The title does not suggest that Congress was undertaking to give any additional jurisdiction to the States or to take any away; it indicates rather an intent to avoid any ambiguity arising out of the Congressional silence. It appears that the McCarran-Ferguson Act was designed to permit the States to regulate, *in the traditional manner,* the business of insurance. It was not designed to permit insurance companies to secure new business by false or misleading advertising in interstate commerce, nor was it intended as an abdication of Federal jurisdiction under the Sherman, Clayton, and Federal Trade Commission Acts over the business of insurance. Had Congress desired to remove the business of insurance from the scope of these laws, it could have done so by simply providing that for the purpose of those statutes the business of insurance across State lines should not be deemed to be "Commerce among the several States." Quite to the contrary, it expressly applied those laws to the business of insurance within certain limits.[3]

[3]The original version of the McCarran-Ferguson Act, as reported by the committees of the respective Houses of Congress, provided flatly that neither the Federal Trade Commission Act nor the Robinson-Patman Act should "apply to the business of insurance or to acts in the conduct of that business." In debate on the floor of the House

The first section of the Act declares that "the continued regulation and taxation by the several States of the business of insurance is in the public interest," and that "silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." "Continued regulation" again conveys the idea that Congress did not intend to give anything to the States that they did not already possess. Silence on the part of Congress was not to be construed as imposing any barrier to State regulation. That is not to say, however, that there were to be no *other* barriers to or limitations upon State regulation: areas in which the States could never regulate were not dealt with one way or the other.

In construing the meaning of this section, it is to be borne in mind that under the commerce clause of the Federal Constitution Congress not only has exclusive power to regulate interstate commerce but in exercising that power can even regulate *intra*state activities which affect interstate commerce. *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 119 (1942). When Congress enters this intermediate zone and legislates fully on a given subject, the Federal statute, "*ipso facto*, supersedes existing state legislation on the same subject." *Southern Ry. Co.* v. *R. R. Comm., Indiana*, 236 U. S. 439, 446 (1915).

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the wisdom of such an exclusion was questioned (91 Cong. Rec. 1027), and the Chairman of the House Committee on the Judiciary offered to propose to the Joint Committee of Conference the elimination of the exclusionary section and the inclusion of the Federal Trade Commission Act in the moratory section, thus making the Federal Trade Commission Act applicable to the insurance business, along with the Sherman and Clayton Acts, after 1947. No opposition to this proposal was voiced on the floor. The conference committee adopted the suggestion, with the result that the Federal Trade Commission Act was to apply to the business of insurance upon lapse of the moratorium.

The first section must therefore mean that the continued regulation and taxation by the States of the business of insurance *to the limits of their constitutional power* is in the public interest. Certainly the States lack the power to tax or regulate purely interstate activities of insurance companies. It can only be that the section provides that State authority over *intra*state insurance business that might affect interstate insurance business could not be disturbed by Federal legislation which did not specifically mention insurance.

We now approach the determination of the proper construction of the crucial second section of the McCarran-Ferguson Act. Subsection (a) thereof makes the business of insurance and everyone engaged therein "subject to State laws relating to the regulation or taxation of such business." This is a clear pronouncement that the *South-Eastern Underwriters* case does not dislodge State regulation of insurance.

The second section goes on to provide in subsection (b):

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance * * * unless such Act specifically relates to the business of insurance: * * *.

Obviously, this does not purport to give the States the power to legislate outside their jurisdiction. Nor does it interfere in any way with Federal laws covering interstate commerce over which the States could not ever claim jurisdiction, e.g., the postal statutes. See *United States* v. *Sylvanus*, 192 F. 2d 96, 100 (7th Cir. 1951), *cert. denied* 342 U. S. 943 (1952). Such laws cannot impair or supersede

State laws, for they do not relate to the same channels of commerce. And, under the terms of the Act, they become inoperative only if and to the extent that they impair, invalidate, or supersede State laws. *Maryland Casualty Co.* v. *Cushing,* 347 U. S. 409, 413 (1954).

Section 2(b) continues:

> Provided, That after January 1, 1948, * * * the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Even without such a proviso the Federal Trade Commission Act would have been applicable to those aspects of the business of insurance which are exclusively in interstate commerce, for that area was never reached by State law. They could not, therefore, be "regulated by State law." Moreover, if this proviso meant only that no action could be taken under the Federal Trade Commission Act which was in conflict with State law it was wholly unnecessary. The statute already had stated that no Act of Congress shall invalidate, impair, or supersede a State law unless it relates specifically to insurance. It is the office of a proviso "to except something from the operative effect or to qualify or restrain the generality of the substantive enactment to which it is attached." *Cox* v. *Hart,* 260 U. S. 427, 435 (1922). The proviso in the McCarran-Ferguson Act must therefore make the Federal Trade Commission Act an exception to the rule that no Federal law not relating specifically to insurance may supersede a State law enacted for the purpose of regulating the business of insurance. It must have been contemplated that under certain conditions the Federal Trade Commission Act might supersede a State law pur-

porting to regulate the business of insurance but not covering all aspects thereof. In its application to the interstate phase of a transaction which cannot be regulated by State law, for example, the Federal law in one sense would supersede a State law covering the same subject matter in a different and local phase of the transaction.

The Federal and State laws in this field supplement and reinforce one another in order to provide full protection to the public. Indeed, it seems to us that such a view is not only consonant with but imperative to the preservation of the public interest in this domain. We fully subscribe to the principle that the Federal Government ought not encumber the States in wielding the maximum of their sovereign powers over the business of insurance. This we understand to be the essential aim of the McCarran-Ferguson Act. But, in the absence of a far stronger and more positive commandment than that statute lays down, we cannot be persuaded that, as to the business of insurance, the Federal authority has been ousted from the interstate regulatory sphere. It surely could not have been the Congressional intent to create a legal vacuum wherein an insurance company would have been enabled to escape regulation of the interstate aspects of its business in cases in which the Federal and State laws did not conflict.

We observe that Section 3(a) of the McCarran-Ferguson Act is a moratory clause suspending the application of the Federal Trade Commission, Sherman, Clayton, and Robinson-Patman Acts to the business of insurance for nearly three years. If those statutes were not to "apply *to the business of insurance* or *to acts in the conduct thereof*" until January 1, 1948, we think it logically follows that they were

to apply to that business and to those acts after the prescribed date. Thus this subsection, as well as Section 2(b), is inconsistent with any notion that the Commission's jurisdiction over the interstate aspects of the insurance business was repealed.

In withdrawing Federal jurisdiction under the Federal Trade Commission, Sherman, Clayton and Robinson-Patman Acts over the business of insurance for nearly three years, Congress apparently was attempting to eliminate arguments by insurance companies that Federal regulation alone was adequate and that State regulations were burdening interstate commerce. Congress gave the States about three years in which to define a reasonable area of State police power. Beyond that reasonable area States could not go. Regardless of whether a State regulated insurance during this time, after 1947 the Federal Trade Commission was expressly authorized to regulate it on different grounds, namely, regulating the use of the interstate channels of commerce.

Since the Court in the *South-Eastern Underwriters* case had said that insurance sold by a company in one State to a customer in another State was in interstate commerce, this type of transaction was subject to the jurisdiction of the Commission. During the moratorium, Congress intended that the Commission not exercise its jurisdiction. After that period the Federal Trade Commission Act was again to apply, to the extent that the business of insurance was not regulated by State law. Since the States were given no new jurisdiction, State law could regulate the business of insurance only to the extent possible before the *South-Eastern Underwriters* decision. And, as the Court recognized in that

case, there were elements of interstate transactions which the States could not regulate.[4]

The legislative history of the McCarran-Ferguson Act supports the foregoing conclusion. We believe this legislative history shows plainly that in enacting that measure Congress was concerned only with ensuring that State laws regulating the business of insurance should not be superseded in the zone of "affecting interstate commerce" by Federal legislation not expressly relating to insurance. Thus we find in the reports of the committees of both Houses of Congress this statement:

> Inevitable uncertainties which followed the handing down of the decision in the *Southeastern Underwriters Association case,* with respect to the constitutionality of State laws, have raised questions in the minds of insurance executives, State insurance officials, and others as to the validity of State tax laws as well as State regulatory provisions; thus making desirable legislation by the Congress to stabilize the general situation.
>
> Bills attempting to deal with the problem were considered in both the House and the Senate during the Seventy-eighth Congress, but failed of enactment. Your committee believes there is urgent need for an immediate expression of policy by the Congress with respect to the continued regulation of the business of insurance by the respective States. Already many insurance companies have refused, while others have threatened refusal to comply with State tax laws, as well as with

[4] "The power granted to Congress [by the Commerce Clause] is a positive power. It is the power to legislate concerning transactions which, reaching across state boundaries, affect the people of more states that one;—to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing." 322 U. S. at 552.

> other State regulations, on the ground that to do so, when such laws may subsequently be held unconstitutional in keeping with the precedent-smashing decision in the *Southeastern Underwriters case,* will subject insurance executives to both civil and criminal actions for misappropriation of company funds. [Sen. Rep. No. 20, 79th Cong., 1st Sess., 1-2; H. R. Rep. No. 143, 79th Cong., 1st Sess., 2.]

But authority to regulate the interstate aspects of the business of insurance was to remain with the Federal Government, as can be seen from the following statement in the House Committee report, which was quoted with approval by Senator McCarran in floor debate on the bill (91 Cong. Rec. 1443):

> It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association* case. Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject always, however to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in *Allgeyer* v. *Louisiana* (165 U. S. 578), *St. Louis Cotton Compress Co.* v. *Arkansas* (260 U. S. 346), and *Connecticut General Insurance Co.* v. *Johnson* (303 U. S. 277) * * *. [H. R. Rep. 143, 79th Cong., 1st Sess., 3.]

The three cases last cited in the foregoing excerpt all hold that a State's power to tax insurance activities is limited to transactions occurring within its boundaries. We would be

hard put to account for the reference to these decisions if the purpose of the McCarran-Ferguson Act were to substitute an exclusive State power for the Federal Trade Commission's jurisdiction over the interstate aspects of the insurance business.

We are confirmed in our belief to the contrary by the decision of *United States* v. *Sylvanus,* 192 F. 2d 96 (7th Cir. 1951), *cert. denied* 342 U. S. 943 (1952), wherein the Court held that the McCarran-Ferguson Act did not abolish Federal jurisdiction under the postal laws to prosecute for mail fraud committed in the sale of insurance in a State having its own statutes regulating that business. The Court carefully distinguished the interstate and *intra*state aspects of the defendant's deceptive practices:

> [I]t can not properly be said that this indictment has to do with the regulation of insurance business in Illinois. Rather it has to do with the question of whether defendants have used the mails in pursuance of a scheme so to manipulate their authorized regulated business in Illinois as to result in fraudulent deception of its prospective policy holders. The charge is not that the corporate charter should be ignored or that the administrative officers of Illinois may not perform their statutory duties and supervise and regulate the company's insurance business in Illinois, but goes to the use of the mails, over which the Congress has, by the Constitution, paramount power and authority. It matters not that the alleged fraudulent actors might be prosecuted under the law of Illinois. The indictment charges simply that acts of deception amounting to a scheme to defraud have been committed by defendants, in conducting their authorized business, and that defendants have availed themselves of the mails in execu-

> tion or attempted execution of that scheme. It is immaterial that the fraudulent plan itself is outside the jurisdiction of Congress, *Badders* v. *U. S.*, 240 U. S. 391 * * *(or that the scheme charged involved a transaction forbidden by the laws of the state. *O'Hara* v. *U. S.*, 6 Cir., 129 F. 551.
>
> We conclude, then, that it was not the intent of the Congress, by its passage of the McCarran Act, to surrender control of the use of the mails or to cease to authorize the federal courts to determine whether the mails have been utilized in attempted execution of a scheme to defraud and that the district court, by entertaining jurisdiction, did not interfere with regulation of the insurance company by the state but properly overruled the motions to dismiss the indictment [192 F. 2d at 100.]

Unlike the Federal Trade Commission Act, the postal laws were not expressly brought by the McCarran-Ferguson Act to bear on the business of insurance. Indeed, that statute declares that *no* Act of Congress not specifically relating to the business of insurance shall be construed to invalidate, impair, or supersede any State law regulating that business. Yet in the *Sylvanus* decision, *supra,* the Court held that a postal statute banning a course of conduct which in its *intra*state aspects constituted a State offense was unaffected by the McCarran-Ferguson Act.

All the more, then, under the Federal Trade Commission Act, which the McCarran-Ferguson Act made applicable to the business of insurance, there must remain an irreducible area of Commission jurisdiction over the interstate activities of insurance companies which cannot be reached by State law and as to which the limitation "to the extent

that such business is not regulated by State law'' is inoperative.

A State can revoke an insurance corporation's charter or license, thus affecting interstate commerce to some degree. To the extent necessary to enable it effectively to exercise its police power the State can take action having consequences in other jurisdictions, and the Federal Trade Commission could not prohibit such regulation. And the text and history of the McCarran-Ferguson Act leave no doubt that the power of the States to tax, or to fix rates for, insurance companies doing business within their territories was in no way to be invalidated, impaired, or superseded by Federal law. However, as we have already said, our proceeding to abate deceptive practices by such companies does not impinge on those State functions, and we do not believe that the Federal Trade Commission Act, when read in conjunction with the McCarran-Ferguson Act, can be properly interpreted to interfere with the taxing or rate-fixing powers.

By executing its statutory mandate to prevent deceptive practices in the interstate business of insurance, the Commission in no wise usurps State laws prohibiting false advertising. The Federal Trade Commission Act and the State laws are both designed to suppress deception in advertising. The Commission's action in the instant matter aids the States in their own local procedures to protect their citizenry from such excesses. The McCarran-Ferguson Act was passed to enable them to continue such regulation. *Maryland Casualty Co.* v. *Cushing,* 347 U. S. 409, 413 (1954).

The principle that the Commission may proceed against a practice that may simultaneously be the object of State

regulation is one of long standing.[5] Thus the Commission's orders prohibiting the interstate shipment of lottery devices to be used in selling merchandise have been universally upheld on judicial review despite the fact that such devices are not put to their intended use until they have left the channels of interstate commerce (just as the respondent's brochures are not displayed for sales purposes until they have come to rest int he hands of respondent's agent within a State). See *Seymour Sales Co.* v. *FTC,* 216 F. 2d 633, 635-6 (D. C. Cir. 1954), *cert. denied* 348 U. S. 928 (1955), and cases therein cited. The idea of a field of enforcement divided between Federal and State Governments is embedded in a numbr of statutes, in addition to the McCarran-Ferguson Act. Examples of these are Acts dealing with the sale of liquor (the Wilson Act, 26 Stat. 313, and the Webb-Kenyon Act, 33 Stat. 699), convict-made goods (the Hawes-Cooper Act, 45 Stat. 1084, and the Ashurst-Sommers Act, 49 Stat. 494), oleomargarine (32 Stat. 193), diseased plants (44 Stat. 98), black bass (64 Stat. 845), whaling (49 Stat. 1246), prizefight films (54 Stat. 686), and the Federal Power Act (49 Stat. 838).

In view of our foregoing consideration of the terms, legislative history, and judicial interpretation of the McCarran-Ferguson Act, we do not think the statute admits of the construction placed on it by the hearing examiner.

Respondent points out that it did not send its advertising materials to sales prospects but mailed them to its own

[5]As recently as April 2, 1955, the Supreme Court of the United States reaffirmed this principle in *Pennsylvania* v. *Nelson,* 350 U. S. ——, declaring that where the Federal Government had occupied the field of protecting against sedition, States were not thereby prevented "from prosecuting where the same act constitutes both a Federal and a State offense under the police power * * *."

agents in various States for local use, and that hence its advertising occurred only in *intra*state commerce. We consider such an analysis factitious and unrealistic. Respondent's annual premium collections on health-and-accident insurance sold by its agents throughout fourteen States amount to about $2,750,000. It employs an indisputable channel of interstate commerce, the mails, for sending advertising materials to its agents, receiving applications for insurance from them, and forwarding the issued policies to them for delivery to policyholders. The actual interview of a prospect, though it necessarily happens at a fixed geographical point within some State, cannot be isolated from the remainder of respondent's established course of dealing. By preparing its brochures and furnishing them, by mail, to its agents in various States for their use in sales presentations, respondent engages in an interstate commercial practice that must be viewed as a whole and not compartmentalized. *Consolidated Manufacturing Co.* v. *FTC*, 199 F. 2d 417, 418 (4th Cir. 1952).

Under the Federal Trade Commission Act, one who sells through agents in other than his home State must answer for deceptive advertising which he supplies to his agents, even though such representations are by necessity conveyed to the public within a particular State. *General Motors Co.* v. *FTC*. 114 F. 2d 33, 36 (2d Cir. 1940); *Ford Motor Co.* v. *FTC*, 120 F. 2d 175, 183 (6th Cir. 1941).

The Commission is accordingly of the opinion that the hearing examiner erred in not holding that the Commission had jurisdiction over such of respondent's practices in interstate commerce as might be found to be unfair or deceptive, irrespective of the existence of State statutes applicable to the *intra*state elements of such practices.

We turn now to the appeal from the hearing examiner's dismissal of the complaint for lack of substantial evidence.

Respondent was charged with falsely representing, among other things, that the indemnification provided by its policies might continue to the age of sixty, or for an indefinite period, at the option of the insured. The sole evidence adduced on this allegation consists of brochures which state as follows, or similarly:

> NO AGE PROVISION terminating or reducing benefits because of increasing age,

and—

> POLICY FORM ASA Issued to Men and Women, ages 18 to 60.
>
> Only persons engaged in non-hazardous occupations are eligible and all applicants must be in good health.

We do not believe that these two statements, separately or together, particularly in the absence of assertions of lifetime duration or any other definite period of coverage, can be reasonably read as meaning more than that respondent's policies contain no provisions terminating or reducing benefits on account of increasing age and that applicants for such policies must be within the age limits specified. It is true that respondent's accident-and-health policies are term contracts renewable at the option of the company on the premium data. However, nothing to the contrary is expressed or reasonably implied in the aforequoted statements and we therefore discern therein no capacity or tendency to deceive. We uphold the hearing examiner's dismissal of the complaint in this respect.

Respondent was next charged with falsely representing that its policies provide indemnification for all illness or ac-

cidents. To prove this charge there were introduced respondent's brochures containing broad, general representations, of which the following are typical:

> (CONFINING)
> (ILLNESS)
> (INDEMNITY)
>
> $........................PER MONTH
>
> for loss of time from illness, beginning on the fourth day and continuing for one year for each illness. (Up to two months full benefits for non-confining illness.)
>
> Total
> Accident..per month
> Disability
> for loss of time from accidental injury beginning with the first day of disability and continuing for life if you are totally disabled.
>
> Partial
> Accident..per month
> Disability.
> for loss of time from accidental injury, beginning with the first day and continuing for period of partial disability (limit 3 months).

In conjunction with the foregoing there were introduced copies of respondent's policies containing conditions substantially limiting the illness and accident benefits advertised. The examiner found that the charges in this regard were not supported by substantial evidence, not for the reason that the representations were not proved nor that the terms of the policies did not materially limit the advertised benefits, but for a number of other reasons which are in our judgment unsound and contrary to controlling precedent.

The examiner attached great weight to the fact that the brochures in question included a statement to the effect that

benefits therein described "are subject to the terms of the policy issued." We are not in accord with the examiner's view that such a notice is sufficient to correct erroneous impressions given by the representations "CONFINING ILLNESS INDEMNITY—$......................per month for loss of time from illness, beginning on the fourth day and continuing for one year for each illness," or "TOTAL ACCIDENT DISABILITY—$..................per month for loss of time from accidental injury, beginning with the first day of disability and continuing for life while you are totally disabled." Respondent's vice-president, W. C. Murphy, testified that an agent's sales kit consisted of the sales brochures, a rate book, "and, I guess, a fountain pen," and that respondent's agents are not required to carry sample policies with them. These sales brochures consist of an application form and a receipt form for the initial payment. These facts lead us to believe that many applicants do not see sample policies before executing formal applications for respondent's insurance. We consider this circumstance significant. In the context of the sales presentation, in the course of which the prospect has little or no opportunity to inspect a sample policy, the sales brochure, we are convinced, clearly has the tendency and capacity of misleading as to the extent of coverage. We disagree with the examiner's statement that if the prospect would read the entire page he would see that all benefits are subject to the terms of the policy and then if interested he would naturally inquire of the agent as to the terms. Rather it is our view that the brochure functions as a self-contained piece of advertising that of itself is likely to induce a prospect to purchase respondent's insurance.

Furthermore, we do not believe that the prospective purchaser is under any obligation to investigate the extent to

which respondent's unrestricted representations of coverage for illness or accidents are untrue. "Under repeated decisions, the purchaser is entitled to rely upon the representations made. He need not distrust what is told him. * * * It goes without saying almost that it is extremely difficult for a layman to understand the terms and conditions of such policies as these, but whether the applicants did or did not read and understand the policies is beside the point." *United States* v. *Sylvanus,* 192 F. 2d 96, 105 (7th Cir. 1951) *cert. denied* 342 U. S. 943 (1952).

If the busy or careless businessman is entitled to protection from deceptive printed forms, even though an attentive, careful person would not be deceived thereby, *Independent Directory Corp.* v. *FTC,* 188 F. 2d 468, 470, 471 (2d Cir. 1951), it does not devolve upon respondent's prospects to ascertain the extent to which respondent's advertising may or may not exaggerate or falsify. The Federal Trade Commission Act is violated if the first contact or interview is secured by deception even though the true facts are made known to the purchaser before he enters into the contract to purchase. *Carter Products, Inc.* v. *FTC,* 186 F. 2d 821 824 (7th Cir. 1951).

Another questionable premise in the examiner's reasoning is that "any reasonably intelligent person considering the purchase of health and accident insurance would be expected to know that health and accident policies do not ordinarily cover all illnesses and all accidents, regardless of their nature or time of origin or occurrence." Apart from the fact that the Federal Trade Commission has the duty to protect not only the "reasonably intelligent" but also the ignorant, the unthinking, the credulous, and the inexper

enced, *Charles of the Ritz Dist. Corp.* v. *FTC,* 143 F. 2d 676, 679 (2d Cir. 1944), we question whether the fact asserted by the examiner to be common knowledge—if it be a fact—is generally known even to the "Reasonably intelligent." It is certainly not beyond the realm of actuarial conceivability, not to say possibility, that in these United States in the mid-twentieth century insurance could be written which would afford protection against all illness and all accidents.

The examiner noted that no proof of actual deception was offered and declared, "Absence of such evidence justifies a presumption that none existed." Despite his disclaimer of reliance on such a presumption, it evidently was one of the considerations impellilng him to dismiss these charges. This is manifest error. It was firmly established long since that actual deception of the public need not be shown in Federal Trade Commission proceedings and that representations having a capacity to deceive are unlawful. *Charles of the Ritz Dist. Corp.* v. *FTC, supra,* 143 F. 2d at 680.

The initial decision devotes considerable space to three decisions of the Supreme Court of Mississippi, all involving private litigation, in which that Court accorded a more liberal interpretation to the conditions contained in accident and health policies similar to those here than their literal intendment would seem to justify. He concludes from these holdings that the conditions are not so burdensome as to render untrue respondent's broad representations.

The decisional law of a single State is no sure guide to the interpretations that other States may place on respondent's policies. What is more, the fact that a policyholder may eventually prevail over a respondent in an appeal from a jury trial does not rectify the deception inhering in the sales

practices whereby he was induced to purchase the insur-ance. He may be discouraged by the literal terms of the pol-icy from seeking legal redress. We do not consider that the fact that if he perseveres to his State supreme court he may succeed in winning an interpretation of respondent's policy more favorable to him than the language literally warrants is a substitute for the protection assured him by the Federal Trade Commission Act.

The hearing examiner discusses at some length the rea-sonableness of the restrictions that respondent attaches to its illness and accident benefits. This is, of course, not ger-mane to the question of whether respondent's representa-tions tend to deceive and mislead.

There remain for discussion two other charges dismissed by the examiner. It was alleged that respondent had repre-sented its hospital-and-surgical-expense policy to provide for the payment of $150 for any operation serious enough to justify such a surgeon's fee. The evidence shows that re-spondent disseminates a one-page advertisement which among other things, states that the policy provides for—

> SURGERY
> from $3.00 to $150.00 $150.00
> depending on seriousness
> of operation

The policy to which this refers sets out a long schedule of the various amounts payable for specified types of surgical operations. Sixty-seven different benefits are enumerated. A mere six of these amount to $150: operations for removal of a portion of the lung, removal of kidney, removal of portion of the vertebra, removal of entire prostate or thy-roid gland, and cutting into the cranial cavity.

Only $25 is allowed for removal of tonsils and adenoids. Appraising this advertisement as it is likely to be read by unsuspecting, incautious members of the purchasing public, we gain the impression that the policy will indemnify up to a maximum sum of $150 for any surgical operation serious enough to cost such an amount. Thus, if a tonsillectomy cost $50, we would think it reasonable to expect that one insured by the policy would be protected to that extent. The advertisement is therefore deceptive and misleading in that it promises benefits which the policy does not corroborate.

Lastly, it was charged that respondent falsely represented that its hospital-and-surgical-expense policy would pay maternity benefits in addition to room service and hospital expense.

On the advertisements for this type of policy, following a listing of the benefits of room service, hospital expense, and surgery, there is shown as one of the "Additional Benefits:"

> *Maternity:* Up to $........................ after insurance has been in force for 10 months.

We would have difficulty in reading the foregoing as anything less than a representation that the maternity benefit is in *addition* to the other benefits provided by the policy. In actuality, however, the maternity benefit is provided for in a rider wherein it is specified that the maternity benefit shall be "in lieu of all other benefits provided in the policy for hospital service." Thus, far from being an *additional* benefit, it is only a *substitute* benefit, and the representation in regard thereto is hence at material variance with the facts. We believe that the type of misconception that such

advertising as this can engender in the minds of couple seeking to provide financially for the birth of children i especially vicious. There can be no question that it is patent deception to describe as "additional" a benefit whicl excludes participation in other benefits, directly followin a broad representation that hospital and surgical expense are covered.

In view of the foregoing, the initial decision is vacate and set aside, and our findings as to the facts, made on con sideration of the whole record including the initial decision and conclusions and order to cease and desist will be issue in lieu thereof.

Commissioners Gwynne and Mason dissent.

April 24, 1956.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY, a corporation.	Docket No. 6237

JOINT DISSENTING OPINION OF CHAIRMAN GWYNNE AND COMMISSIONER MASON

We are unable to agree with the views expressed in the majority opinion. The reasons for our dissent are: first, the opinion completely ignores the intent of Congress in adopting Public Law 15 (McCarran Act); second, it would return the insurance business to the uncertainty and confusion which followed the decision in *U. S.* v. *South-Eastern Underwriters Association,* (1944) 322 U. S. 533. It was to remove this uncertainty and confusion that the McCarran Act was adopted.

Prior to the decision in the *South-Eastern Underwriters* case, regulation of insurance was recognized as a problem for the respective states. This was partly because the Supreme Court of the United States in a long line of decisions from *Paul* v. *Virginia,* 8 Wall. 168, to *New York Life Insurance Company* v. *Deerlodge County,* 231 U. S. 495, had held that the business of insurance was not commerce.

Although the business of insurance was not subject to regulation under the commerce clause, it was universally recognized as a business affected with a public interest. Consequently, the states found few obstacles to regulating it to the fulllest extent and in the manner the respective legis-

latures thought to be for the public good in their particular states. These laws took the form of determining who should engage in the insurance business within the state boundaries, the terms under which the business might be conducted, regulation as to rates to be charged (even to the extent of fixing them, or permitting representatives of insurance companies to do so under state supervision). The right of the states to levy tax and license fees, even discriminating against foreign insurance corporations, was also recognized. See 44 C. J. S. p. 518; *LaTourette* v. *McMaster, Insurance Commissioner,* 244 U. S. 465.

Had these regulations been directed at the usual industry engaging in interstate commerce, many would have run counter to paramount Federal authority. For example, the many discriminatory taxing programs were not in accord with decisions of the Supreme Court relating to interstate commerce generally. Certain state rate regulations were contrary to the philosophy of Federal antitrust laws. No conflict arose, however, because it had been settled that the business of insurance was not interstate commerce.

This does not mean that the insurance business and the states in regulating it were free from all Federal constitutional and statutory provisions. They were, of course, subject to such constitutional restraints as the due process clause, the exclusive right of Congress to establish post offices and post roads [*U. S.* v. *Sylvanus* (1951), 192 F. 2(d) 96] and many others. In fact they were, and still are, subject to all restraints properly imposed by paramount power except as that power elects to exempt them.

In regulating insurance, states act under that great reservoir of power known as the police power. There are, o

course, jurisdictional limitations on the exercise of that power. It may be directed only at activities within the state. It has never been claimed that the states may operate directly in that phase of regulation known as the flow of commerce. Nor by no stretch of the imagination can it be said that the McCarran Act intended to give any such power.

In 1944 in the *South-Eastern Underwriters* case, the court reversed its holdings of 75 years standing and concluded that the business of insurance was interstate commerce. It was also specifically held that it was subject to the Sherman Act.

The immediate effect of this decision was to bring the business of insurance and the laws of the various states regulating it under the paramount power of the Federal antitrust laws. Because of the inconsistency previously referred to, this created considerable uncertainty and confusion in the insurance field, of which Congress took immediate cognizance.

Confronted with this emergency, Congress had several alternatives:

(1) It might take no action and allow the antitrust statutes to be superimposed on the existing state systems of regulation and taxation. This would create great confusion as to the legal boundaries between Federal and state control, which confusion could only be lessened, bit by bit, as courts made decisions on specific problems.

(2) It might write a comprehensive law for Federal regulation of insurance,—a law which would provide new methods for many matters theretofore handled by the states, and which might make such changes in the application of existing antitrust laws to the peculiar

business of insurance as experience had indicated might be necessary.

(3) It might recognize and continue existing or future state regulation by removing the obstacles to that regulation which had been called into being by the decision that the business of insurance was interstate commerce.

Congress chose the latter course and expressed its choice by the adoption of the McCarran Act. The general purpose of this legislation was to meet the problems created by the *South-Eastern Underwriters* case. The plan for meeting this problem is clearly expressed in the law. It may be reduced to a simple statement as follows: The Congress declares that the continued regulation and taxation by the states of the business of insurance is in the public interest and shall remain, with two exceptions, namely, (1) this Act shall not render the Sherman Act inapplicable to agreements to or acts of boycott, coercion or intimidation, and (2) that after June 30, 1948 (but not before), the Sherman Act, the Clayton Act and the Federal Trade Commission Act shall be applicable to the business of insurance, but only to the extent that such business is not regulated by state law. Thus, in any case, the jurisdictional question may be quickly and certainly resolved by finding the answer to a simple question, namely, is there state regulation to meet the particular problem presented by the facts.

That this is the proper interpretation of the law is indicated by the following: (1) the wording of the statute itself, (2) the legislative history, (3) events which transpired immediately following passage of the law, (4) decisions of the courts interpreting the McCarran Act.

It is, of course, well settled that the power of Congress under the commerce clause is broad and is also paramount. It includes the right to regulate, or even prohibit, the flow of things across state lines, the right to regulate the instrumentalities by which commerce is carried on, and also the right to regulate activities, wholly within the state, which affect interstate commerce. The power to regulate the so-called flow of commerce covers every species of movement of persons and things, whether for profit or not; every species of communication; every species of transmission of intelligence, whether for commercial purposes or otherwise; every species of commercial negotiations, which, as shown by the established course of business, will involve sooner or later an act of transportation of persons or things, or the flow of services or power across state lines. (See the *Analysis of the United States Constitution* as prepared by the Legislative Reference Service, Library of Congress, and cases cited.)

The great power of Congress to regulate matters wholly within the state but affecting interstate commerce is well settled in *U. S.* v. *Darby* (1944), 312 U. S. 100, in which the court held that the payment of substandard wages wholly within a state affected commerce and could be prohibited.

Going with these great powers, and a necessary corollary to them, is the right of Congress to determine where and when these powers are to be used. Thus, it may decline to exercise certain powers; and it may condition its refusal to exercise them on the fact of regulation by the states.

This is exactly what Congress was seeking to do in the McCarran Act. Much of the fallacy of the reasoning in the majority opinion springs from a refusal to recognize this

obvious fact. The majority would decide the issues in this case by applying principles which admittedly were applicable following the decision in the *South-Eastern Underwriters* case. They conveniently ignore the fact that the purpose of the McCarran Act was to prevent the application of these principles.

For convenience, and before discussing the law in detail, the McCarran Act is set out here in full text:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
>
> "Sec. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> "(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

"Sec. 3 (a) Until January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

"(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

"Sec. 4. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

"Sec. 5. As used in this Act, the term 'State' includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

"Sec. 6. If any provision of this Act, or the application of such provision to any person, or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected."

While the title to a statute is not, strictly speaking, a part of the law, nevertheless, it is interesting to note that the title is "To express the intent of the Congress with reference to the regulation of the business of insurance."

Immediately after the enacting clause, occurs the following:

> "That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, * * *."

This is a clear and positive declaration of Congressional policy, which cannot be read out of the law. It expressly points out the character of state regulation and taxation which is in the public interest. It is the "continued regulation". In the past, the states have done all the regulating so far as the commerce clause was concerned. That was to carry on, with the exceptions expressly provided for, and which will be discussed hereafter. There is nothing in this statement or in the entire Act which justifies the interpretation that the regulation contemplated was to continue only by the grace of the Federal Trade Commission.

Speaking on this subject in *Prudential Insurance Company* v. *Benjamin,* 328 U. S. 408, the Supreme Court of the United States had this to say:

> "Obviously Congress' purpose was broadly to give support to the existing and future State systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation. The other was by declaring expressly and affirmatively that continued State regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject to' the laws of the several States in these respects.
>
> "Moreover, in taking this action Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that

they differ greatly in the scope and character of the regulations imposed and of the taxes exacted; and of the further fact that many, if not all, include features which, to some extent, have not been applied generally to other interstate business. Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations.

* * *

"* * * it clearly put the full weight of its power behind existing and future State legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided for."

That a declaration of policy by Congress will be given weight by the courts is well settled. See *U. S.* v. *Darby,* 312 U. S. 100.

Continuing, the statute further provides:

"* * * and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

Some of the powers granted to Congress by the Constitution are either expressly, or by necessary implication, exclusive and cannot be exercised by the states, even though Congress has taken no action thereon and has remained silent on the subject. The power to declare war is an example. Under the commerce clause, the line between Federal and state authority cannot be so precisely drawn. This is particularly true in the field of state activities which may or may not have a prohibited effect on interstate commerce.

The supremacy of the Congress, when properly exercised in this field, is clearly recognized. A difficult problem arises where the powers of Congress are allowed to lie dormant, that is, when Congress is silent on a given subject. Should its silence be construed as a reservation of its power, which will bar any state regulation; or will it be considered as consent to state action until Congress has spoken? This question has arisen many times and has received a variety of answers, depending upon the circumstances of the particular case.

The question of silence of Congress is not involved in this case. The Congress evidently thought it might be raised, and intended to make its position clear. The inclusion of the above quoted clause indicates how thoroughly Congress has considered this matter and how determined it was to remove all possible barriers to its declared policy of state regulation.

Section 2(a) provides:

> "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

When used in this connection, "subject to" means "subordinate to", "obedient to". *Shay* v. *Roth,* Calif. (1923), 221 P. 967; *Davies* v. *City of Los Angeles* (1890), 24 P. 771.

In a long line of cases from *Paul* v. *Virginia* to *New York Life Insurance Co.* v. *Deerlodge County,* insurance companies have challenged their subjection to state regulatory or taxing laws. The Supreme Court, however, consistently rejected this defense on the theory that the business of insurance was not interstate commerce.

When the Supreme Court in *South-Eastern Underwriters* reversed its decision, this defense became good, and the business of insurance was subject to state laws, only to the extent that such laws did not interfere with paramount Federal power under the commerce clause. In Section 2(a) Congress clearly showed its intention to remove the barrier of its own paramount power and thus make the business of insurance subject to state laws, notwithstanding the decision in *South-Eastern Underwriters.*

Section 2(b) provides:

> "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon insurance: *Provided,* That after January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

Stronger language to give state laws "top billing" could hardly be imagined. The clause beginning with "unless" is particularly significant. While Congress had not legislated directly concerning the insurance business, it had done so with reference generally to interstate commerce and with reference to persons and corporations engaged therein. The antitrust laws are examples. Congress in Sec. 2(b) said none of these laws (except as indicated in the proviso) shall apply to the business of insurance, unless such law specifically relates to insurance. It recognized: first, that insurance has some problems peculiar to that industry; second, that many

states had adopted regulatory systems tailored to the insurance business in their boundaries; and, third, that any attempt to superimpose the general laws regulating commerce on these systems would create great confusion.

The proviso applies only to the provision immediately preceding it. *Dahlberg* v. *Young* (1950) Minnesota 42 N. W. 2nd 570. It provides an exception to the general statement preceding it, which exception is that the three Acts named therein shall, after January 1, 1948, apply to the business of insurance,—but only to the extent that such business is not regulated by state law. This proviso was adopted to answer criticism of the original House bills, which provided simply that certain laws shall not apply to the business of insurance or to acts in the conduct of that business. In other words, in the original bills, the House proposed to wash its hands of the whole matter, regardless of whether any particular state had provided regulation. The final version, which was accepted by the House without objection, simply conditioned Federal withdrawal from the field on the fact that the particular state had provided regulatory laws. In view of the strong stand taken by the House in favor of continued state regulation, it does not seem reasonable that it would have accepted, without question, this final version, if (as claimed by the majority) such version set up concurrent jurisdiction, with the Federal power paramount to the state power.

What Congress had in mind is further illustrated by Section 3(a) which provides that until January 1, 1948, the antitrust laws should in no event apply to the business of insurance. The majority claim that the purpose of this moratorium was to give the states time "in which to design

a reasonable area of state police power. Beyond that reasonable area, states could not go."

That view is based on a misconception of the state police power. That power was reserved to the states by the Constitution. It is not up to the Congress to determine whether it is exercised reasonably. Whether exercised reasonably or not, this power is subject, at all times, to the paramount power of the Federal government under the commerce clause and other constitutional provisions not involved here; and in case of conflict, the question is resolved by the Federal government and not by the states. The whole purpose of the McCarran Act was to express the Congressional intent that the barrier of paramount power under the commerce clause was to be removed in the event that the states did adopt regulatory laws. The purpose of the moratorium was to give the states time to adopt such laws. Failing to do so in any particular area, the Federal power would still remain.

Section 3(b) provides:

> "Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion or intimidation."

The *South-Eastern Underwriters* case involved a boycott by a number of insurance companies operating in several states. The Congress concluded that the paramount power of the Federal government in such cases should remain.

The fact that Section 3(b) is in the law is a strong argument against the interpretation urged by the majority. If the McCarran Act left the Federal government and the

states with concurrent powers (in which the Federal power would necessarily be paramount), why was it necessary to include Section 3(b)?

The legislative history of the McCarran Act strongly supports our interpretation of the jurisdictional feature.

While the *South-Eastern Underwriters* case was pending in the Supreme Court, bills were introduced in the House, providing for the unqualified exemption of insurance from the Sherman and Clayton Acts. Thereafter, and after considering suggestions by representatives of the National Association of State Insurance Commissioners, and also by representatives of the insurance industry, bills were introduced both in the House and Senate, which bills, with some minor modification, eventually became the McCarran Act. In some respects, these bills further limited the control of Congress, as, for example, in the inclusion of the Federal Trade Commission Act. In other respects, the Federal authority was broadened to retain control, in all cases where state regulation did not exist. The law, as finally passed, is clear on this point; regulation shall remain in the states with the exception of the boycott situation, and with the exception of those situations where a state either did not or could not adopt the necessary regulations.

There is literally no evidence to the contrary. Note the following excerpts from the Senate debate.

> Senator Murdock: "And it is intended that on the expiration of the moratorium, the Sherman Act, the Clayton Act, and the other acts mentioned will again become effective, except—."
>
> Senator McCarran: "Except as the states themselves have provided regulation."

* * *

Senator Pepper: "States may determine whether or not the Sherman and other acts become applicable to the business of insurance?"

Senator McCarran: "Yes."

What was done after the adoption of the McCarran Act indicates that the persons concerned had no doubt about the meaning of the Act. The National Association of State Insurance Commissioners prepared a model code for the regulation of the insurance business in accordance with the directions of Congress. This code has been adopted by a majority of the state legislatures. Other states have adopted laws which in effect are equivalent.

It is difficult to understand why these actions should have been taken if the parties thereto thought that the net result would leave the law as it was just prior to the McCarran Act, which is the contention of the majority in this case.

The McCarran Act has been considered in four Federal court cases. In none of them, did the court experience any difficulty in determining what the McCarran Act meant. In the Sylvanus case, the court said:

> "It is clear, we think, that by this legislation, the Congress established a public policy upon the part of the national government to refrain from interference with the regulation and taxation of insurance companies by the several States."

In *Maryland Casualty Company* v. *Cushing* (1953) 347 U. S. 409, the Supreme Court said:

> "Even the most cursory reading of the legislative history of this enactment (McCarran Act) makes it clear that its exclusive purpose was to counteract any adverse effect that the court decision in the South-

Eastern Underwriters case might be found to leave on state regulation of insurance.''

The Court then quotes from House Report No. 143, 79th Congress, 1st Session, as follows:

> ''It is not the intention of Congress in the enactment of this legislation to clothe the states with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision in the South-Eastern Underwriters case.''

A clearer and more concise statement of the extent of the McCarran Act, and also its limitations, could hardly be found.

In *North Little Rock Transportation Co.* v. *Casualty Reciprocal Exchange* (1950), 181 F. 2d, 174, the Court said:

> ''The purpose of the McCarran Act was to permit the States to continue the regulation of the business of insurance, unhampered, to the extent provided by the Act, by Federal legislation relating to interstate commerce. See *Prudential Insurance Co.* v. *Benjamin,* supra, p. 429 of 328 U. S.
>
> ''In view of what was said by the Supreme Court about the effect of the McCarran Act in the *Prudential Insurance Co.* case and the case of *Robertson* v. *People of State of Calif.,* 328 U. S. 440, 449, 461, there is no need for discussing the validity or effectiveness of the McCarran Act. A ruling that it is invalid or ineffectual we think, would be absurd.''

The *Prudential Insurance Company* case is directly in point. There, the Prudential company challenged a statute of South Carolina which imposed on foreign insurance companies as a condition of doing business within the state, an annual tax of 3% of premiums on business done in the state

without reference to transactions, whether interstate or local. It should be noted that the case did not involve purely intrastate matters, which the majority claim is the limit of the McCarran Act's effectiveness. This state tax was clearly discriminatory, affected interstate commerce, and would ordinarily have been stricken down. However, it was not, and the reason given was that a state tax or regulation discriminating against interstate commerce which would be invalid under the commerce clause, in the absence of action by Congress, may be validated by the affirmative action of Congress consenting thereto. The only difference between the Prudential case and the one at bar is that the former deals with state taxation and the latter with state regulation. The McCarran Act covers both.

The majority view of jurisdiction under the McCarran Act is entirely different. They say the McCarran Act "was designed to permit the states to regulate, *in the traditional manner,* the business of insurance." They obviously do not mean they are permitted to regulate it as they did prior to the *South-Eastern Underwriters* case, because their decision in this case asserts the paramount power of Federal laws over those of the states.

No law of Congress was necessary to give the states a right to carry on activities within their own borders, designed to regulate insurance. That is covered under the police power, guaranteed to the states by the Constitution. Just as Congress with reference to powers under the commerce clause, state legislatures may exercise these powers or not as they choose, subject only to their own and the Federal Constitution. The real problems arise when the exercise of these powers come in conflict with the commerce

clause. There, the Federal power is paramount. *Parker* v. *Brown,* 317 U. S. 34. *Southern Railway Company* v. *Railroad Comm. of Indiana,* 236 U. S. 439. But, as was pointed out in the latter case, Congress could have circumscribed its regulation so as to occupy a limited field. This intention to occupy a limited field is the very essence of the McCarran Act.

Just how far the majority would go in disregarding this intention is well illustrated in the case at bar. For example, suppose a state having the model code should decide that certain advertising disseminated therein did not violate the law. Nevertheless, the Federal Trade Commission asserting its paramount power to regulate the flow of commerce into the state comes to an opposite conclusion. Or suppose the state officials held the advertising was illegal, while the Federal Trade Commission held to the contrary. The majority decision does not recognize state regulation; it destroys it.

The cases cited do not support the majority position. Of course, the Federal government, under the commerce clause, may regulate the flow of lottery devices into a state, regardless of state laws on the subject. The reason is that Congress has never enacted in the lottery field an equivalent of the McCarran Act. It requires a violent stretching of the imagination to find any support in the *Sylvanus* decision. There, the defendant was indicted under a statute prohibiting the use of the mails to defraud. The power of Congress in mail fraud matters does not depend on interstate commerce; it is based on the exclusive Constitutional right to control the mails. Prior to the *South-Eastern Underwriters* case, immediately after and prior to the McCarran Act, and

under the McCarran Act, the result would have been the same. As the Court well expressed it, "This indictment does not have to do with the regulation of the insurance business in Illinois. Rather it has to do with the question of whether defendants have used the mails in pursuance of a scheme so to manipulate their authorized regulated business in Illinois as to result in fraudulent deception of its prospective policy holders. The charge is not that the corporate charter should be ignored or that the administrative officers of Illinois may not perform their statutory duties and supervise and regulate the company's insurance business in Illinois, but goes to the use of the mails over which Congress has by the Constitution paramount power and authority."

The McCarran Act arrests the overriding power of the Federal government under the commerce clause as it affects insurance, where the states have regulatory laws. Nowhere does the Act express any intention of doing the same with the power to regulate the mails, the power to enforce due process, or the many other constitutional powers.

To us, the conclusion is inescapable that under the majority view, the McCarran Act accomplished nothing. Courts will not presume that a statute was meant to have no effect. On the contrary, it will be presumed that the legislative body intended to make some change in existing laws, particularly where the whole history shows they intended to remedy what they thought was an existing evil. This rule is usually applied in situations where the over-all intent is not clearly expressed in clear language.

Here, the majority would reverse these well-known rules of statutory construction in order to prove that Congress

accomplished nothing. They, in effect, rewrite portions of the McCarran Act as follows:

> That the Congress hereby declares that paramount regulation and taxation by the Federal government of the business of insurance, rather than the continued regulation and taxation thereof by the several states, is in the public interest.
>
> Section 2 (a). The business of insurance, and every person engaged therein shall be subject to the laws of the several states which relate to the regulation or taxation of such business, only to the extent that such laws do not conflict with the paramount Federal power under the commerce clause.
>
> Section 2 (b). Any act of Congress, whether it specially relate to the business of insurance or not, shall be construed to invalidate, impair or suspend any law enacted by any state for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, whenever the state law conflicts with such act of Congress. The Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance regardless of any state regulation on the subject.

II

Our second objection to the majority opinion is that it would return the insurance business to the confusion into which it was plunged by the *South-Eastern Underwriters* decison. The nature and extent of that confusion was well expressed by the dissenting judges. The late Mr. Chief Justice Stone said:

"* * * And in view of the broad powers of the federal government to regulate matters which, though not themselves commerce, nevertheless affect interstate commerce, *Wickard* v. *Filburn,* 317 U. S. 111; *Polish Alliance* v. *Labor Board,* supra, there can be no doubt of the power of Congress if it so desires to regulate many aspects of the insurance business mentioned in this indictment.

"But the immediate and only practical effect of the decision now rendered is to withdraw from the states, in large measure, the regulation of insurance and to confer it on the national government, which has adopted no legislative policy and evolved no scheme of regulation with respect to the business of insurance. Congress having taken no action, the present decision substitutes, for the varied and detailed state regulation developed over a period of years, the limited aim and indefinite command of the Sherman Act for the suppression of restraints on competition in the marketing of goods and services in or affecting interstate commerce, to be applied by the courts to the insurance business as best they may.

"In the years since this Court's pronouncement that insurance is not commerce came to be regarded as settled constitutional doctrine, vast efforts have gone into the development of schemes of state regulation and into the organization of the insurance business in conformity to such regulatory requirements. Vast amounts of capital have been invested in the business in reliance on the permanence of the existing system of state regulation. How far that system is now supplanted is not, and in the nature of things could not well be, explained in the Court's opinion. The Government admits that statutes of at least five states will be invalidated by the decision as in conflict with the Sherman Act, and the

argument in this Court reveals serious doubt whether many others may not also be inconsistent with that Act. The extent to which still other state statutes will now be invalidated as in conflict with the commerce clause has not been explored in any detail in the briefs and argument or in the Court's opinion."

The late Mr. Justice Jackson said:

"The states began nearly a century ago to regulate insurance, and state regulation, while no doubt of uneven quality, today is a successful going concern. Several of the states, where the greatest volume of business is transacted, have rigorous and enlightened legislation, with enforcement and supervision in the hands of experienced and competent officials. Such state departments, through trial and error, have accumulated that body of institutional experience and wisdom so indispensable to good administration. The Court's decision at very least will require an extensive overhauling of state legislation relating to taxation and supervision. The whole legal basis will have to be reconsidered. What will be irretrievably lost and what may be salvaged no one now can say, and it will take a generation of litigation to determine. Certainly the states lose very important controls and very considerable revenues.

"The recklessness of such a course is emphasized when we consider that Congress has not one line of legislation deliberately designed to take over federal responsibility for this important and complicated enterprise. * * *

"It is impossible to believe that Congress, if it ever intended to assume responsibility for general regulation of insurance, would have made the antitrust laws the sole manifestation of its purpose. Its only command is to refrain from restraints of trade. Intelligent insur-

> ance regulation goes much further. It requires careful supervision to ascertain and protect solvency, regulation which may be inconsistent with unbridled rate competition. It prescribes some provisions of policies of insurance and many other matters beyond the scope of the Sherman Act.
>
> "Also it requires sanctions for obedience far more effective than the $5,000 maximum fine on corporations prescribed by the antitrust laws. Violation of state laws are commonly punishable by cancellation of permission to do business therein—a drastic sanction that really commands respect."

The accident and health insurance industry is a large and important one; yet, it is a small part of the business of insurance. This case, under Section 5 of the Federal Trade Commission Act, involves only a matter of advertising. But Section 5 is a comprehensive section which covers many things, such as combinations and restraints under the Sherman Act and at common law, price fixing, and many other things which the Federal Trade Commission might hold to be unfair methods of competition.

As has been frequently said, insurance is a business effected with a public interest. Many years of regulation in 48 states have developed the fact that insurance has some problems peculiar to the business. One is the necessity of maintaining an industry whose financial ability to meet obligations accruing many years in the future will not be undermined by short term considerations. Consequently, the states have asserted their right to regulate the financial policies of the companies licensed to do business in their states, to demand the deposit of certain reserves, to regulate and even limit competition, to fix rates, etc. Some of the

regulations permit, or even require, cooperative action among insurance companies which could easily be contrary to the philosophy of the Federal antitrust laws.

In this connection, the majority opinion says:

> "However, as we have already said, our proceeding to abate deceptive practices by such companies does not impinge on those state functions, and we do not believe that the Federal Trade Commission Act can be properly interpreted to interfere with the taxing or rate-fixing powers."

We have already called attention to the breadth and extent of the Federal power to regulate the flow of commerce and also to the extensive power under the "affecting interstate commerce" theory to regulate matters entirely within the state which were once thought to be far removed from Federal authority. In *South-Eastern Underwriters,* the Supreme Court called attention to the many activities of a modern insurance company which involved or affected interstate commerce as we now know it. Such activities are necessarily centered in a home office. From there and to there, flows a constant stream of advertising brochures, policies, applications, statements, rate schedules, directions, etc. These have to do with all the activities of the insurance business and are not restricted to advertising.

In this case, jurisdiction is based on the admitted fact that the respondent sent bundles of advertising matter into states where it was licensed to do business. Actual dissemination of the advertising occurred entirely within the state. Except for the McCarran Act, it is clear this limited proof would sustain paramount Federal jurisdiction. Just how the majority arrive at the conclusion that similar proof

would not sustain Federal jurisdiction in taxing and rate-making matters is not clear.

In fact, the decision in *North Little Rock Transportation Co.* v. *Casualty Reciprocal Exchange, supra,* is to the contrary. That case involved an appeal from a summary judgment of dismissal of a treble damage suit. The dismissal was based upon a determination that the fixing of rates by the National Bureau of Casualty Underwriters for casualty insurance written in the State of Arkansas by the members and subscribers of the Bureau is not violative of the Sherman Act, as amended. The Court adopted the findings of the District Court, one of which was:

> "3. In the absence of public regulation or Congressional exemption, the price fixing activities of the Bureau involved in this case would constitute a violation of the Sherman Act." 85 F. Supp. 961, at p. 964.

The Circuit Court of Appeals affirmed the holding of the District Court that the McCarran Act permitted the State of Arkansas to continue the regulation of insurance in the matter of rate fixing, which regulation, without the McCarran Act, would have violated the Sherman Act.

It is our conclusion that the majority opinion would bring tremendous confusion in the insurance industry and would open the door wide to complete Federal control. We are not discussing the relative merits of Federal versus state control. All we say is that the decision belongs to Congress and not to a Federal bureau.

The hearing examiner, after applying the jurisdictional tests to which we subscribe, concluded that in all states in which respondent was licensed to do business, except Mississippi, state regulation did exist. The hearing examiner

then considered the alleged illegal advertising in Mississippi and concluded that it did not violate the Federal Trade Commission Act.

We have repeatedly pointed out that, under the McCarran Act, the Federal Trade Commission has some jurisdiction in the business of insurance. Within that jurisdiction, and in performance of duties imposed by Congress, 41 complaints have been issued. Where the Commission has jurisdiction, we would hold insurance companies to a high degree of responsibility in their dealings with the public. Consequently, we do not approve of some of the statements made by the hearing examiner in his consideration of the advertising in question.

However, that matter is not now before us. Since the filing of the initial decision, Mississippi has adopted the model code, effective as of February 29, 1956.

The law governing such a situation is clearly expressed in *United Corporation, et al.* v. *Federal Trade Commission* (1940), 110 F. 2d 473, as follows:

> "And since the power of the Federal Trade Commission is purely regulatory and not punitive, it is clear that jurisdiction must exist at the time of the entry of its order. Jurisdiction at the time of the commission of acts objected to as unfair trade practices or at the time of the filing of the complaint with regard thereto is not sufficient; for the order to be entered does not relate to past practices or determine rights as of the time of the filing of the complaint, as in an action at law, but commands or forbids action in the future."

In *Chamber of Commerce of Minneapolis, et al.* v. *Federal Trade Commission* (1926), 13 F. 2d 673, the Court said:

> "As the orders of the Commission are purely remedial and preventative, the effect thereof is entirely in the future. Therefore, the jurisdiction of the Commission should, in this respect, be measured as of the time of the order rather than as of the filing of the complaint or as of the hearing thereon."

It thus appears that in every state involved in this case, state regulation now prevents further action by the Commission.

In accordance with the views expressed in this dissent, we would deny the appeal and dismiss the complaint.

April 24, 1956.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY, a corporation.	Docket No. 6

ADDITIONAL VIEWS OF COMMISSIONER MASON

The issues here resolve itself basically into that ever fundamental question—states' rights versus centralized government.

Our problem is not the determination of which philosophy is right—that is a legislative function. Our sole duty is to determine which road Congress has directed us to follow in the instant matter.

In my opinion, if the rationale on which the majority bases its decision in this case stands, it must of necessity follow that the Federal Government has almost unlimited control over the management of the insurance business.

This would apply not only to false advertising of health and accident policies, the present center of our attention in 41 cases, but would include all other aspects of the business of insurance, such as the approval of policy forms, the establishment of rates, the maintenance of reserves, the regulation of agency commissions, and the countless other components of the internal management of any single company or companies.

To transfer in one fell swoop the control of every phase of the business of insurance, whether regulated or not by state law, to the Federal Government when crossing state lines is to flout the expressed intent of Congress.

April 24, 1956.